No. (1)

Supreme Court, U.S.
FILED
081566 JUN 18 2009
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In The Supreme Court of the United States

BRITTANY McCOMB and MARIANNA McCOMB, by her best friend, CONSTANCE J. McCOMB,

Petitioners,

v.

GRETCHEN CREHAN, ROY THOMPSON, and CHRISTOPHER SEFCHECK, individually and in their official capacities as employees of Foothill High School, and the Clark County School District, a political subdivision of the State of Nevada, and WALT RUFFLES, in his official capacity as Superintendent of the Clark County School District, a political subdivision of the State of Nevada, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Does the First Amendment prohibit public high school officials from censoring student-initiated, student-composed religious speech at a high school graduation ceremony?

2. Do the First Amendment Free Speech, Free Exercise and Establishment clauses prohibit a school district from censoring religious speech that expressly identifies with a particular religion while permitting non-sectarian religious speech?

3. Does the First Amendment and this Court's decision in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), prohibit a public high school from using viewpoint-based criteria in restricting student-initiated religious speech at high school graduation ceremonies?

4. Can an interlocutory appellant unilaterally re-start the 30-day clock for filing an interlocutory appeal (per FED. R. APP. P. 4 jurisdiction limits) by re-filing the same motion previously denied by the lower court?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Brittany McComb, Constance J. McComb and Marianna McComb respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

PARTIES TO THE PROCEEDING

The Petitioners are Brittany McComb, Constance J. McComb and Marianna McComb, through her guardian Constance J. McComb.

Respondents are Gretchen Crehan, Roy Thompson, and Christopher Sefcheck, individually and in their official capacities as employees of Foothill High School, and the Clark County School District, a political subdivision of the State of Nevada, and Walt Ruffles, in his official capacity as Superintendent of the Clark County School District, a political subdivision of the State of Nevada.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is not reported but attached. Appendices at 1 ("App. ___".). The Orders of the District Court denying Respondents' motions to dismiss are also not reported and attached. (App. 62-65.)

STATEMENT OF JURISDICTION

The District Court exercised jurisdiction over Petitioners' federal claims pursuant to 28 U.S.C. § 1331. The Complaint was filed on July 13, 2006. Respondents filed their first motion to dismiss on October 5, 2006 which the Court denied at a hearing held on December 18, 2006, as noted by a minute-entry on the docket entered the next day. The District Court filed an Order denying this motion to dismiss on January 9, 2007. (App. 62.) Petitioner filed an Amended Complaint on December 21, 2009. Respondents filed a second motion to dismiss on January 11, 2007, which the District Court denied by order entered on June 18, 2007. (App. 65.)

Respondents filed what Petitioners believe was an untimely Notice of Interlocutory Appeal on June 28, 2007. *See* FED. R. APP. P. 4(A)(2).

The Ninth Circuit Court of Appeals filed its Memorandum Opinion on March 20, 2009 (App. 1) and Petitioners accordingly timely file this Petition pursuant to SUP. CT. R. 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners' claims arise under the First and Fourteenth Amendments to the United States Constitution, which provide in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

> or abridging the freedom of speech .... (U.S. Const. amend. I)
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const. amend. XIV, § 1)

Petitioners' claims arise under Clark County School District Administrative Regulation 6113.2, *Sectarianism, Religious Free Speech and Religious Holidays* ("Regulation 6113.2"), which provides in relevant part:

> (III) Student initiated non-school sponsored religious speech is acceptable in the public schools in the same manner as other free speech.
>
> (IV) School officials may not mandate or organize prayer at graduation or other extracurricular activities or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to

> the school and, therefore, may not be restricted because of its religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech is not school sponsored.

(Regulation 6113.2 §§ (III) & (IV)) (App. 1.)

Petitioners also raise a claim regarding the interpretation of Rule 4 of the Federal Rules of Appellate Procedure's jurisdictional limitations.

INTRODUCTION

Petitioner Brittany McComb ("Brittany" or "Petitioner") and two other students were asked to speak at their high school graduation ceremony because they each had achieved the distinction of valedictorian by virtue of their grade point average. Each student was asked to speak about their high school experience and what they wished from life for themselves and others. Brittany sought to speak about the importance of her newly found Christian commitment and how it related to her success in high school; another student, Janelle Oehler ("Janelle"), spoke about the importance of "Our Heavenly Father" in the success achieved in her life. Brittany was censored; Janelle was not.

The Respondents' (collectively the "School Officials") decision to censor Brittany's views cannot

be reconciled with the language and spirit of this Court's First Amendment jurisprudence. This Court has cautioned against treating "nondenominational" or civically-oriented religious speech differently from sectarian religious speech, yet that is precisely the distinction the Ninth Circuit drew in this case and in two other cases over the past several years on which it relied.

This Court should grant certiorari to clarify to the lower courts that student-initiated, student-composed religious speech at high school graduation ceremonies does not violate the Establishment clause and that censoring such speech violates the Free Speech clause and, in this instance, the Establishment clause.

Second, the Court should grant certiorari because the reasoning employed by respondents and the Ninth Circuit to justify different treatment of religious speech does not comport with *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) and *Lee v. Weisman*, 505 U.S. 577 (1992), the Court's two leading "school speaker" Establishment clause cases. Ninth Circuit precedent currently permits standardless censorship of religious speech that the Ninth Circuit courts believe is proselytizing. But *Weisman* and *Santa Fe* do not permit a school district to make judgments about the merits of sectarian versus "civically-oriented" religious speech. Nor do they authorize school officials to discriminate between nonsectarian student religious speech and student speech that is proselytizing. Indeed, *Weisman* specifically cautioned against favoring one religious view over another, particularly on the ground that one is more civic-seeming than another.

Weisman, 505 U.S. at 598. The reason is simple -- to favor non-sectarian religious speech over sectarian religious speech gives one religious viewpoint preferential treatment in violation of the Establishment clause. Here, the School Officials made a considered judgment that notwithstanding the students' neutral selection and primary control over their speeches, the School Officials' limited involvement in reviewing the speeches and permitting them to be delivered at graduation rendered them "endorsed" by the school. Permitting Janelle to highlight the benefits of her relationship with her Heavenly Father but prohibiting Brittany from highlighting the benefits of her relationship with Jesus Christ, the School Officials favored one religion over another in violation of the Establishment Clause.

Third, certiorari should be granted to resolve confusion among the Circuits concerning the correct standard of review for evaluating claims of viewpoint discrimination in "school-sponsored" events. Under *Hazelwood School District v. Kuhlmeier, et al.* 484 U.S. 260 (1988), a school has the authority to "exercis[e] editorial control over the style and content of student speech in *school-sponsored* expressive activities as long as its actions are reasonably related to *legitimate pedagogical concerns*." *Id.* at 273 (footnote omitted; emphasis added). The Circuits are split, however, as to whether a school's decision must be based on viewpoint-neutral criteria. Here, the School Officials, exercising unfettered, standardless discretion, labeled the religious content in Brittany's speech as "proselytizing" and thus turned off the microphone in the middle of her speech. Yet, at the

same graduation ceremony, the School Officials allowed another graduation speaker to deliver a similar speech with religious content. The sole distinction was that Brittany's speech mentioned Jesus Christ and was deemed to be proselytizing and the other student's was not. Putting aside whether the School Officials are qualified to make such judgments, they should not be discriminating between different types of religious speech. Notwithstanding the split in the Circuits, this Court has not spoken on that precise issue and should do so.

Finally, the Court should grant certiorari to resolve a split among the Circuits concerning the time limitation for filing interlocutory appeals. Rule 4 of the Federal Rules of Appellate Procedure requires a party to file an interlocutory appeal within thirty days of entry of the judgment or order. FED. R. APP. P. 4(a)(1). In the instant matter, the Ninth Circuit allowed Respondents' appeal to proceed even though they did not file a timely notice of appeal from the District Court's denial of their first motion to dismiss. Rather, relying on *Knox v. Southwest Airlines*, 124 F.3d 1103, 1106 (9th Cir. 1997), the Court of Appeals allowed Respondents to appeal from an Order denying their virtually identical motion directed at an amended complaint. The Ninth Circuit's ruling is inconsistent with the rulings of other Circuits that have held otherwise. This Court should resolve this dispute and hold that Rule 4(a)(1) prohibits a party that fails to file a timely interlocutory appeal from salvaging that appeal by filing an appeal from the denial of an identical successive motion to dismiss.

STATEMENT OF THE CASE

Brittany was one of three class of 2006 valedictorians of Foothill High School ("Foothill" or the "School") selected to give a commencement speech at the school's annual commencement ceremony held at the "Orleans Arena" in "The Orleans Hotel & Casino" in Las Vegas, Nevada. *See* Compl. at ¶ 25 (App. 29).[1] On June 15, 2006, as Brittany delivered her speech, she was silenced in front of 400 of her peers, and thousands of guests, simply because she mentioned the importance of her Christian faith to her success in high school. *See* Compl. at ¶¶ 62-63 (App. 36.)[2] At the same time, the School Officials permitted another valedictorian to invoke her religious beliefs repeatedly in her speech and others to speak about the reasons for their success and inspiration. *See* Compl. at ¶ 64C (App. 37-38.)

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[1] Brittany's mother, Constance J. McComb, and her sister, Marianna McComb, then a student at Foothill High School, are also plaintiffs in this case. Constance and Marianna were both deprived of the right to hear Brittany's speech in a public forum and each joined in the suit because of that deprivation and the potential future discrimination against religious speech in future commencement exercises at Foothill. *See* Compl. at ¶¶ 3A, 4 (App. 20.)

[2] A video of the speech may be found at: http://www.youtube.com/watch?v=kqzflitfHjU (last visited 6/16/09).

A. The School Officials' Selective Censorship of Brittany's Speech Violated Her Constitutional Rights

Foothill selected speakers based solely upon the neutral criterion of student grade-point average. Compl. at ¶¶ 17-18 (App. 24.) When invited to speak, Respondent Thompson, Foothill's acting Assistant Principal, provided each valedictorian with a document entitled "Commencement Speech *Suggestions*" (emphasis added) (App. 5); *see also* Compl. at ¶¶ 20, 20A (App. 25.) These suggestions neither encouraged nor discouraged speakers from utilizing religious content in their speeches. *Id.*; Compl. at ¶ 27 (App. 29.) Rather, they ranged from the procedural ("[l]imited to 200 words"; "length: 1-2 minutes"), to the substantive:

> Use "imagery and metaphorical comparison";
>
> "Interject HOPE";
>
> "OMIT thank you ...";
>
> include "[t]hings that bind us to one another";
>
> "[r]eflect over past experiences and lessons learned"; and
>
> "say things that come from the heart."

Id.

Brittany followed these "suggestions" to the letter. Her draft speech, entitled "Filling That Void," used "imagery and metaphorical comparison," "interject[ed] hope," "[r]eflect[ed] over past

experiences and lessons learned" at Foothill and spoke "from the heart" about the emptiness she experienced from accomplishments, achievements, and failures in her early high school years, and the fulfillment and satisfaction she later came to experience in something greater than herself, namely in God's love, and in Christ. *See* Brittany's Draft of Commencement Speech ("Draft Speech") (App. 6); Compl. at ¶¶ 28-30 (App. 20.) To Brittany, any remarks about her success and formative experiences in high school would be dissembling without reference to her relationship with God. Compl. at ¶ 30 (App. 29-30.) Like the speeches by the Salutatorian, the other Valedictorians and, indeed, the Principal and a Member of the Clark County School District's Board of Trustees (the "District"), Brittany's speech fit within the School's "suggestions." It was a personal statement about the lessons that she learned during her odyssey at Foothill, and how those experiences affected her life and her future. *See* Draft Speech (App. 6); Compl. at ¶¶ 29-30, 64C (App. 29-30, 37-39.)

Brittany's speech as drafted quoted the Bible, described her Christian outlook and told the audience that they could likewise find fulfillment through Christ if they chose. She did not say a prayer, and whether her remarks were proselytizing is at most a matter of debate. What is indisputable is that her words were her own. She wrote primarily from the first person about what "worked for her." *Id.* She spoke about what she wanted for herself and for others. She was one speaker among several, all of whom spoke about similar topics but as individuals who brought to bear different and unique perspectives. A reader of Brittany's draft speech,

recognizing the context in which it would be presented, could not reasonably have believed the school was sponsoring her religious views; instead Brittany's words were explicitly and forthrightly the views of a young, vibrant straight-A student explaining her view of the foundations of her success. *See id.* Nor would a listener of the other students' speeches reasonably believe that the school was endorsing or sponsoring their views. All students knew from the program and introduction that Brittany and the other students were speaking as Valedictorians, selected solely because they were the three students with the highest grade-point averages, and expressing their own views about life.

At Mr. Thompson's request, Brittany submitted the speech she had drafted. Compl. at ¶¶ 34-35 (App. 30-31.) He returned the speech to her heavily censored. *See* Draft Speech (App. 6); Compl. at ¶¶ 40-41 (App. 31-32.) Substantial passages were crossed out, and annotated with "IDENTIFIES A PARTICULAR RELIGION," "DEITY," and "PROSELYTIZING." *Id.* Respondents Crehan and Thompson informed Brittany that she could not deliver the speech she had written because of its "religious references," including her mention of Jesus Christ. *Id.*

The School and its attorney rebuffed numerous attempts by Brittany and her mother (and attorney) to meet to discuss the content of the speech and to clarify the basis for their censorship. Compl. at ¶¶ 48-52 (App. 33-34.) Ultimately, on the day of her Commencement, Brittany chose to deliver the original unedited version of her speech. *Id.* at ¶¶ 61-62 (App. 36.) The moment Brittany began to speak

the words the School Officials had crossed out, Respondent Sefcheck turned off the microphone. *Id.* Despite a school policy that permitted school officials to "make appropriate, neutral disclaimers to clarify that such speech is not school sponsored,"[3] at no point did any of the Respondents attempt to give a disclaimer to the audience prior to the commencement speeches. *Id.* at ¶¶ 56-66 (App. 35-36.) Such a disclaimer would have made clear -- if anyone believed it was not clear already -- that the views of the speakers were not endorsed by the school district. *See id.*

The School district thereupon permitted another valedictorian to speak, *without* interference, about her own religious viewpoint. Compl. at ¶ 64C (App. 37-38.) Janelle Oehler, another Valedictorian selected based on her grade point average, described how a deity, her "Heavenly Father," and "prayer" had played an extremely important role in her life. *Id.* Using the metaphor of a balanced meal, Janelle shared with the audience the following:

> And, of course, *our* meal is never started *without prayer*. My *Heavenly Father* plays an extremely important role in my life. I am confident that I would not be standing before you today if I had not included Him in my life. He is the One who truly understands *our* individual needs. He is always there to listen, to lead, to guide, and to give me strength I need

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[3] *See* Administrative Regulation 6113.2 (IV) (App. 3).

> to keep, when I need and to give me strength that I need to keep on going when I no longer believe I can, I would be nothing without Him. *Find your inspiration. Living with the hope* for a brighter future will make significant difference in *our* lives, provide *us* with *true inner happiness* and personal success. If *we* strive to be more motivated by inspiration, *we* will find *ourselves* more satisfied, as if *we* had enjoyed a complete balanced and nutritional spaghetti dinner.

Id. (emphases added).[4] The sole material difference between the viewpoints expressed by these two students was that Brittany's was avowedly Christian and Janelle's was not. But both referred to a deity as a source of inspiration; both provided views as how others could achieve happiness; and both represented indisputably religious viewpoints.

Later, Mary Beth Scow, a Member of the District, offered a speech that quoted a "Chinese proverb," and Respondent Crehan chose in her speech an inspirational charge with a secular bent devoid of "religious references." Compl. at ¶ 64C (App. 37-38); Commencement Excerpts (App. 8-9.)

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[4] Janelle delivered her speech immediately after Brittany's speech was censored. *See* Excerpts of 2006 Commencement Speeches ("Commencement Excerpts") (App. 8-9).

B. The District's Regulations Ensured That the Audience Would Not View Brittany's Speech as School-Sponsored

Respondents repeatedly have justified their censorship as necessary to prevent an Establishment clause violation because graduation speeches containing religious content would bear the imprimatur of school sponsorship. But the District in this matter had numerous policies that it specifically enacted to ensure that student speeches would *not* bear the imprimatur of school sponsorship, which its officials failed to follow.

First, Clark County School District regulations required the School Officials to permit Brittany to address her classmates and their families in her own words. Specifically, Clark County School District Administrative Regulation 6113.2 provided that:

> Where students or other private graduation speakers are selected on the basis of *genuinely neutral, evenhanded criteria* and retain *primary control* over *the content of their expression*, however, that expression is not attributable to the school and, therefore, may not be restricted because of its religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers

> to clarify that such speech is not school sponsored.

See Regulation 6113.2 §§ (III) & (IV) (App. 3) (emphasis added).[5]

Thus, Brittany and the other Valedictorians were selected on the basis of neutral criteria. While they were provided with suggestions for the content of their speeches, it was incumbent upon them to select the topic and write the substance of their speeches. Their speeches were their own, and not the school system's. Moreover, in these circumstances, under the District's own regulations, the School Officials were proscribed from restricting the students' expression based upon religious or anti-religious content.

Furthermore, the District's own regulations and Board minutes show that it recognized that exerting school control over even religious speeches was unnecessary to protect against an Establishment clause violation, because a neutral disclaimer would resolve any appearance of state sponsorship of a speaker's message. Specifically, the District's Board of Trustees, in enacting the current version of Regulation 6113.2, was advised by their General Counsel that the "administration does review the comments that are going to be made by student speakers at graduations," and that "once the

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[5] This regulation is but one of many that provide "specific details and procedures" governing "the details of District operations," and therefore binding on School Officials. *See* Compl. at ¶¶ 23, 24 (App. 26-28.)

administration reviews the comments, it becomes school or district sponsorship." *See* Clark County School District Meeting Minutes (App. 10).[6] Nonetheless, they were told that "[w]hat a student says for a particular success they might have had *is probably going to fall in the area of free speech and going to be allowed ... .*" *Id.* (emphasis added). Notably absent was advice as to standards by which school officials could draw lines as to whether speech was "proselytizing," and whether such "school-sponsored" speech could nevertheless be censored based on viewpoint. Instead, the policy, as adopted, provided for a neutral disclaimer to eliminate all doubt as to school sponsorship of the speech in question. *See* Regulation 6113.2 (App. 3).

Notwithstanding the strictures of Regulation 6113.2 and the policy of invoking a neutral disclaimer, the School Officials instead resorted to the drastic action of turning off the microphone and censoring Brittany's speech as she spoke.

C. The Proceedings Below.

On July 13, 2006, Petitioners filed a Complaint in the United States District Court for the District of Nevada commencing the instant case. *See* Docket for the United States District Court for the District of Nevada ("Court Docket"). Instead of answering the Complaint, the School Officials filed a

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[6] The District's General Counsel is Carl William Hoffman, Esq., who represents the School Officials in this action, and who argued the School Officials' motion to dismiss before the courts below. *See id.*

Rule 12(b)(6) motion to dismiss. *Id.* Those school officials who were sued in their individual capacities argued, among other things, that they were entitled to qualified immunity. *Id.*

The District Court held oral argument on December 18, 2006 on all aspects of the School Officials' motion, including the claim of qualified immunity. At the close of the argument, the court ruled against the School Officials because "it's not clear what was being censored here and what was the basis for the censorship" and discovery was necessary to determine whether the School Officials were entitled to the claimed qualified immunity.[7] The next day the Court placed a minute-entry on the docket denying the School Officials' motion to dismiss. *See* Court Docket. The court subsequently entered a written order denying the motion on January 9, 2007. December 22, 2006 Court Order.[8] The School Officials did not appeal the court's decision within the 30 days provided them by Rule 4. *See* Court Docket.

Shortly after the hearing, Petitioners served a First Amended Complaint to address one or two housekeeping matters and to name the school district's superintendent in his official capacity only. *See generally* Amended Complaint (App. 17.) The Amended Complaint raised no new causes of action, no new allegations of breach of duty, no new

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[7] *See* Official Transcript of December 18, 2006 Oral Arguments Before the District Court of Nevada.

[8] The Order is dated December 22, 2006, but was signed January 5, 2007 and was docketed January 9, 2007.

constitutional claims and certainly nothing that would change the analysis of the School Officials' entitlement to qualified immunity in their individual capacity at the pleading stage. *See id.* The School Officials nevertheless chose to file a *second* motion to dismiss on grounds identical to their first motion. *See* Court Docket. The School Officials made no effort to demonstrate that the intervening complaint somehow changed the governing law or facts, warranting a second consideration by the District Court. They made no effort to show that the District Court made a clear error of law or fact. Instead, the School Officials filed a near carbon copy of their first motion.

The District Court denied the second motion summarily, on the ground that it had already ruled on the identical motion. *See* June 18, 2007 Court Order (App. 65). The court explained:

> [T]he Amended Complaint named ... an additional Defendant and clarified Plaintiffs' factual allegations. However, the Amended Complaint did not add additional causes of action or new allegations. Defendants nevertheless filed a second Motion to Dismiss the Amended Complaint. Defendants' present Motion is virtually identical to the initial Motion to Dismiss. *It raises arguments that have already been briefed, discussed at oral argument, and ultimately rejected by the Court.*

Id. (emphasis added).

On June 28, 2007, The School Officials filed a Notice of Interlocutory Appeal of the June Order. *See* Court Docket. The School Officials to this day have not sought to appeal the court's first Order. *See id.* The School Officials filed their Notice of Interlocutory Appeal more than five months after the District Court denied their initial Motion to Dismiss—well outside the 30-day window provided by Rule 4 of the Federal Rules of Appellate Procedure. The School Officials immediately filed their motion to dismiss the appeal for lack of jurisdiction based on the failure of the School Officials to appeal the District Court's denial of the Rule 12(b)(6) motion within the 30-day period allowed by Rule 4. The issue was joined, with the court deferring its ruling until disposition on the merits.

On the merits, the School Officials argued that their actions did not violate "clearly established" law, and that they were thus entitled to qualified immunity per *Saucier v. Katz*, 533 U.S. 194 (2001). The Ninth Circuit did not decide this issue, but exercised its discretion to decide the case solely on constitutional grounds, as permitted by this Court's recent decision in *Pearson, et al. v. Callahan*, No. 07-751, slip op. 13, 129 S. Ct. 808, 172 L. Ed. 2d 565, 2009 WL 128768 (Jan. 21, 2009).

In its Memorandum opinion, the Ninth Circuit addressed the constitutional issues and ruled summarily "that Defendants did not violate McComb's free speech and free exercise rights by preventing her from making a proselytizing graduation speech," relying on its earlier decisions in *Cole v. Oroville Union High School District*, 228 F.3d

1092, 1101 (9th Cir. 2000), and *Lassonde v. Pleasanton Unified School District*, 320 F.3d 979, 983 (9th Cir. 2003). (App. 1.) The Court continued: "[n]or did [Defendants] violate McComb's right to equal protection; they did not allow other graduation speakers to proselytize." On the jurisdictional issue, the Court assumed jurisdiction over the appeal under Ninth Circuit precedents, citing *Knox v. Southwest Airlines*, 124 F.3d 1103 (9th Cir. 1997), and *Hydrick v. Hunter*, 500 F.3d 978 (9th Cir. 2007). (App. 1.)

I. REASONS FOR GRANTING THE PETITION

1. Selectively Enforcing the Establishment Clause Violates the First Amendment

The Ninth Circuit's decision, which sustained censorship of student-initiated sectarian religious speech but permitted student-initiated nonsectarian religious speech (a) conflicts with other Establishment clause precedents in the Circuits, as well as the decisions of this Court; (b) results in a violation of both the Free Speech and Establishment clauses; and (c) creates confusion among the Circuits regarding viewpoint discrimination.

a. Confusion Among the Circuits Regarding Scope of Establishment Clause

Following *Weisman* and *Santa Fe*, confusion has arisen among the Circuits about how the Establishment clause applies to student *speech* at school graduation exercises. This Court has not

addressed this area of the law and should do so in light of the diverging law in the Circuits.

In *Weisman*, the *only* Supreme Court decision to address prayer at public school graduation programs, the Court found that the school violated the Establishment clause when it invited a rabbi to deliver an "invocation" and "benediction" at a school graduation ceremony and provided him with content for use in delivering the benediction. 505 U.S. at 586, 588. In holding this prayer policy/ practice to be unconstitutional, the Court emphasized two synergistic factors: the extent of state control and the perceived coercion of students to participate. *Id.* The Court determined that "the principal directed and controlled the content of the prayers," thus transforming the prayer into a state-sponsored "*religious exercise.*" *Id.* (emphasis added).

This Court's more recent decision in *Santa Fe* held that a policy allowing members of a senior high school class to elect whether to include a *prayer* before home football games violated the Establishment clause, even if the prayers were "nonsectarian" and "non-proselytizing." 530 U.S. at 298, n.5, n.6. The Court reasoned that the school specifically directed students to consider whether a prayer should be included; therefore the school implicitly encouraged school prayer and created "both perceived and actual endorsement of religion." *Id.* at 305.

Both *Weisman* and *Santa Fe* involved actions by school officials endorsing or approving of school *prayer*. Yet the Ninth Circuit, in this and in its prior decisions in *Cole*, 228 F.3d at 1092, and *Lassonde*,

320 F.3d at 979, interpreted them to prohibit *student-initiated* religious *speech* that, in the Court's view, was proselytizing. These rulings not only misinterpret the direction of *Weisman* and *Santa Fe*; they conflict with other Circuit court decisions examining this issue.

The Eleventh Circuit in *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001), under similar facts, reached a different conclusion than the Ninth Circuit. There, several students challenged a school policy permitting the graduating class to vote for a student speaker to deliver a message at graduation. In practice, the message invariably was a prayer, but there had been no requirement that it be such, and the student was allowed to deliver any message he or she chose. *Id.* at 1336. Applying *Santa Fe*, the court held that the school's policy neither subjected the speech to "'particular regulations that confine[d] the content and topic of the student's message,'" nor "invited and encouraged religious messages." *Id.* at 1336 (quoting *Santa Fe*, 530 U.S. at 303). As such, any religious speech that occurred was student-initiated and could not be attributed to the school.

More recently, in *Doe ex rel. Doe v. School District of Norfolk*, 340 F.3d 605 (8th Cir. 2003), the Eighth Circuit rejected an Establishment clause claim brought against the School District for allowing a member of the school board (who was also the parent of a graduating student) to recite a prayer at the graduation ceremony. *Id.* at 611. The school district argued that it did not sponsor the speech because the board member acted in his personal capacity by invoking his right to speak under an

informal school policy. That policy allowed "(1) a parent of a graduating senior; and (2) a member of the School Board" to speak at graduations as of right. *Id.* (footnote omitted). The court reasoned that under these facts, the Board member was acting on his own and his views could not be attributed to the school; therefore *Weisman* and *Santa Fe* did not require censorship.[9]

There is a direct tension between the law applied in the Eighth and Eleventh Circuit cases cited above and the Ninth Circuit's decision in this case. This case involved a student *speech* that was one of many speeches at the graduation ceremony by students selected on the basis of neutral criteria. The precedents relied on by the Ninth Circuit incorrectly conflate principles that apply to prayer with those that apply to speech. Prayer by definition invites an immediate and participatory, often ritualistic, audience response which the Court has held to be coercive when mandated by the State. As Justice Kennedy wrote for the majority in *Weisman*: "The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an

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[9] Recently the Tenth Circuit in *Corder v. Lewis Palmer School District No. 38*, No. 08-1293, 2009 WL 1492547 (10th Cir. May 29, 2009), upheld a school's decision to censor a student's graduation speech based on its religious content. *Id.* at *1-2, 6. However, this holding is inapplicable to the current matter for two reasons: (1) the Establishment Clause issues in the current matter were not before the *Corder* court, and (2) the school addressed the free speech claim under the *Hazelwood* standard that is inapplicable to the case at bar for reasons explained *infra*. *Id.*

explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid." *Weisman*, 505 U.S. at 598.

But a speech does not constitute a "religious exercise" simply because it has a religious orientation.[10] In the present case, the School Officials did *not* censor Brittany because her speech was a religious exercise akin to prayer; they censored her speech because it was closely identified with the Christian religion and because she suggested that, as with her experience, audience members might benefit from a relationship with Christ. This suggestion required no one to do

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[10] We do not address -- and this Court need not address -- whether and when student-initiated proselytizing religious speech is so akin to prayer that it should be analyzed as such. As anyone who has observed religious speech knows, there is a wide spectrum of what might be termed proselytizing. To be sure, some types of proselytizing speech will, like prayer, invite an immediate and participatory response, perhaps requiring audience members to convert on the spot and come forward. But other forms of religious speech, described by some as proselytizing invite reflection rather than an immediate participatory response. For example, a speaker might recite a parable from which lessons can be drawn or tell the audience that conversion can be a life-changing event from which they have drawn benefits. These distinctions are not relevant here for two reasons. First, Brittany's speech (as well as Janelle's) clearly was personal and not reasonably attributed to the School. Second, no one has suggested that Brittany's speech invited an immediate and participatory audience response that rendered it akin to the prayer that this Court prohibited in *Weisman*.

anything; nor was it significantly different from the suggestions advanced by Janelle or the other speakers who, from each of their own perspectives, challenged students in a similar fashion.

Brittany's speech, based on its content and context, and viewed in light of the school policy against restricting student-promulgated speech, was more akin to the policy and event approved in *Adler* and the perceptions justifying non-intervention in the *Norfolk* case.

The Court should grant certiorari and clarify that student-initiated speeches at graduation, written by the student without any direction by the school to include a religious message, do not violate the Establishment clause.

If the Ninth Circuit's reading of *Weisman* and *Santa Fe* is not overruled, future graduation speeches by students in that Circuit and other Circuits that choose to follow its precedent will be unable to speak with a particular religious viewpoint, even if that viewpoint is critical to the topic on which they are asked to speak. The silencing of personal but sectarian religious expression is inconsistent with the First Amendment, this Court's jurisprudence and the principles that underlie our nation's founding. Moreover, such an indiscriminate result would require the State to distinguish between different messages given by different students and selectively prohibit religious messages. Far from protecting *against* Establishment clause violations, such a result would foster just such violations.

In determining whether student-initiated speech violates the Establishment clause, *Weisman* and *Santa Fe* suggest the proper focus is to examine whether the student was selected to speak based on neutral criteria and whether the school district directed or otherwise provided the content for the student's speech. If the speech was student-initiated, primarily penned by the student, and the school did not specifically direct or provide for religious content, then the speech -- whether sectarian or not -- should not be considered as school-sponsored speech.[11]

Indeed, in *Weisman*, Justice Souter envisioned such a circumstance. In his concurring opinion (joined by Justices Stevens and O'Connor), he stated:

> If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State.

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[11] Similarly, if a school requires a student to follow non-sectarian directions when drafting the speech (as it did for Brittany) and the student personally chooses to deliver a religious speech within the bounds of those directions, the fact that the school had provided non-sectarian directions does not transform the speech into state-sponsored religious speech.

Weisman, 505 U.S. at 630, n.8.[12]

Brittany's case represents what Justice Souter envisioned. The School did not invite Brittany to deliver a religious speech, and certainly did not request her to recite a prayer; nor was her speech a prayer. The School simply told her to write a graduation speech and provided only "suggestions," which specifically erected a barrier between the content of her speech and the views of the District. It is hard to imagine what more the School could have done to dispel the notion that it endorsed the students' speeches. (Of course, the School could have provided a written disclaimer, which its regulations expressly contemplated).

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[12] The guidance offered by the Secretary of Education under the federal Elementary and Secondary Education Act of 1965 ("ESEA"), as amended by the No Child Left Behind Act of 2001, 20 U.S.C. § 6301, *et seq.* (2001), is to the same effect, advising that "[w]here students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression ... [then] that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content." *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, Dep't. of Educ., (http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html) (last visited 6/16/09). The Clark County District Regulation 6113.2 governing Brittany McComb's graduation speech is virtually identical to the federal guidance. *See* (App. 3.)

b. The School Officials Violated Both the Establishment and Free Speech Clauses

The School Officials not only had no Establishment clause justification to censor Brittany's speech, they in fact violated that clause by favoring one type of religious speech over another. In selection of permissible and impermissible religious speech, the school district allowed another student -- Janelle -- to deliver a clearly religious message presumably because, in its view, Janelle's was more acceptable.[13]

Weisman, applied appropriately, *prohibits* a school district from treating one form of religion -- even if "civic" or "nonsectarian" -- more favorably than sectarian religion. In that case, the school argued that the benediction and invocation should have been permitted because they were "nonsectarian." In rejecting that argument, the Court emphasized "that the intrusion was in the course of promulgating religion that sought to be

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[13] The record is not clear at this stage on how School Officials distinguished between the two speeches. It is clear that the censor's pen objected to Brittany's speech because it "IDENTIFIES A PARTICULAR RELIGION," "DEITY," and "PROSELYTIZING." Janelle's speech, however, similarly mentioned a deity, her "Heavenly Father," and spoke of prayer and other practices that identified it with Judeo-Christian concepts of religion. We also know that this Court has never held that religious speech becomes "endorsed" and subject to censorship simply because it is proselytizing. Indeed, neither the School Officials, nor the Ninth Circuit set forth any standards other than the unexplained brief references described in the text. (App. 6.)

civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. At best it narrows their number. At worst it increases their sense of isolation and affront." *Weisman*, 505 U.S. at 594.

The principle this Court articulated in *Weisman* -- that religious speech is religious speech -- apparently is not always heeded by the lower courts and certainly not by the Ninth Circuit here. Religious speech may not be treated more protectively if it is non-denominational, nonsectarian or comports with a government official's understanding or belief of what is an approved or uncontroversial "civic religion." Yet the School Officials here did precisely what *Weisman* prohibited -- they permitted a student-initiated religious speech solely *because* it was nonsectarian. Of course, in Petitioners' view, both Janelle and Brittany engaged in constitutionally protected speech. But if the School Officials *truly* believed that the School retained primary control over student-initiated, student-composed graduation speeches and that the students' speeches therefore reasonably would be viewed as endorsed by the School, the appropriate result would have been to silence *both* Brittany and Janelle.

The specter of secular school officials making judgments about what religious speech is nonsectarian (and presumably non-threatening) and what is sectarian and proselytizing not only presents questions of equal protection of the law under *Larson v. Valente*, 456 U.S. 228, 238-39 (1982), it also runs head-on into *Lemon v. Kurzman's* prohibition against the government's "excessive

entanglement" in religion. 403 U.S. 602, 612-13 (1971). School officials will be expected to draw fine lines of a religious nature each time they review a student speech. This Court made clear over six decades ago that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Here, parsing students speech for what is or is not "proselytizing," or determining that religious speech is "civic" or nondenominational enough, or judging whether mention of a sectarian as opposed to neutral "deity" is offensive, crosses the fabled wall of separation between state and religion and is prohibited. School officials are simply not qualified, nor should they be, to make such judgments.

The disparate treatment of Janelle and Brittany also violates the Free Speech clause. *See Rosenberger v. Rector & Visitors of The Univ. of VA*, 515 U.S. 819, 829 (1995) (holding "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant"). Once a school has opened up a forum to a certain type of speech, it "must respect the lawful boundaries it has itself set." *Id.* It cannot prohibit a qualified speaker from addressing a subject otherwise permitted by its own rules. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109-10 (2001); *see also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (holding "First Amendment forbids the government

to regulate speech in ways that favor some viewpoints or ideas at the expense of others") (citation omitted).

It is axiomatic that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *See Board of Education of Westside Cmty. Schs. 66 v. Mergens by and through Mergens*, 496 U.S. 226, 228 (1990), citing *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) (no danger that high school students' symbolic speech implied school endorsement); *Barnette*, 319 U.S. at 624 (1943), and Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499, 507-509 (1983) (summarizing research in adolescent psychology). The School District's own regulation recognized this non-endorsement principle.

c. Confusion Among the Circuits Regarding Viewpoint Discrimination

Assuming that the School Officials could argue that it restricted Brittany's speech because it was school-sponsored and advanced legitimate "pedagogical" concerns, there exists a conflict among the Circuits regarding the extent to which a school can engage in viewpoint discrimination when enforcing such restrictions under *Hazelwood*.

In *Hazelwood*, the Court broadly pronounced that "educators do not offend the First Amendment

by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273 (footnote omitted). The Court did not address what level of scrutiny the lower courts need to apply when reviewing a school's restriction of speech for these "pedagogical concerns," but Justice Brennan noted in dissent the school's concession that any distinctions on speech it drew were required to be viewpoint-neutral. *Id.* at 287, n.3 (Brennan, J. dissenting).

Some Circuits, however, have read *Hazelwood* as establishing solely a rational basis standard for speech in the public school setting. *See Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 926-29 (10th Cir. 2002) (holding "pedagogical test is satisfied simply by the school district's desire to avoid controversy within a school environment"); *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993) (stating that *Hazelwood* Court "did not require that school regulation of school-sponsored speech be viewpoint neutral"); *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 172-73 (3d Cir.) (holding "*Hazelwood* clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical concerns"), *vacated & reh'g en banc granted*, 197 F.3d 63 (3d Cir. 1999).

Other courts have required a school's restriction not only to be reasonable, but also viewpoint-neutral. *See Peck ex rel. Peck v.*

Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 626, 629-30, 633 (2d Cir. 2005) (concluding that "a manifestly viewpoint discriminatory restriction on school-sponsored speech is, *prima facie*, unconstitutional, *even if* reasonably related to legitimate pedagogical interests") (emphasis in original); *Searcey v. Harris*, 888 F.2d 1314, 1320, n.7 (11th Cir. 1989) (holding that "[a]lthough the Supreme Court did not discuss viewpoint neutrality in *Hazelwood*, there is no indication that the Court intended to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views").

Even though the latter view has been adopted by the Ninth Circuit (*see Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, 941 F.2d 817, 829 (9th Cir. 1991)) the School Officials in the current matter chose not to employ viewpoint-neutral criteria when censoring Brittany's speech. Rather than banning all religious speech at the graduation ceremony, the School faulted Brittany's speech for "iDENTIFIES A PARTICULAR RELIGION," "DEITY," and "PROSELYTIZING." (App. 6.)

In *Cole* and *Lassonde*, the Ninth Circuit ruled that "proselytizing, no less than prayer, is a religious practice." *Cole*, 228 F.3d 1104, citing *Follett v. Town of McCormick*, 321 U.S. 573, 576-77 (1944), and *Murdock v. Pennsylvania*, 319 U.S. 105, 108-10 (1943).[14] On its face, this self-evident proposition

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[14] In *Follett*, the defendant was "'preaching the gospel' by going 'from house to house presenting the gospel of the

Footnote continued on next page

hardly seems disputable. But to analogize coerced prayer and door-to-door religious solicitation with a student-initiated graduation speech on a permitted topic that is not inherently religious raises a host of constitutional difficulties. First, prayer and one-on-one religious solicitation indisputably demand a personal response. But a speech at a public event, in the context of multiple speeches from multiple perspectives, may be challenging, but does not require such a personal response. What then are the standards for proselytizing? When does a speech become proselytizing? Can non-religious speech be proselytizing and, if so, why should religious speech be treated differently? If students are asked to speak about their values, is it permissible to coerce them to misrepresent their viewpoints when their values are religiously based, or to deny them the honor and benefit of speaking *because* of their religious viewpoints?

The Ninth Circuit -- in a one-page summary disposition -- did not elaborate as to what standards it applied to Brittany's speech, holding simply that the School Officials did not discriminate because they "did not allow other graduation speakers to proselytize" (App. 1-2). Allowing schools to

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kingdom in printed form.'" *Follett* at 576. And in *Murdock*, the defendants were claiming "to follow the example of Paul, teaching 'publicly, and from house to house.' Acts 20:20." *Murdock* at 108. The Court recognized this as "an age-old form of missionary evangelism" where "colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith." *Id.*

haphazardly censor speech in this manner with the indiscriminate application of the "proselytizing" label, corrupts the purposes of both the Free Speech and Establishment clauses. If the Ninth Circuit ruling is sustained, schools would effectively have free license to choose exactly which religious content will be given a voice at school ceremonies, as they did in this case.

2. Allowing an Appellant to Indefinitely Toll the Time To File an Interlocutory Appeal Would Render Rule 4 Meaningless

Petitioners request the Court to alleviate confusion among the lower courts regarding the interpretation of the 30-day jurisdictional limitation of Rule 4 of the Federal Rules of Appellate Procedure. FED. R. APP. P. 4(a)(1)(A) (requiring a party to file a "notice of appeal ... with the district court within 30 days after the judgment or order appealed from is entered").

In the matter before the Court, the School Officials failed to file their interlocutory appeal within the 30-day jurisdictional limit required under Rule 4. Instead, after the District Court denied the School Officials' motion to dismiss, the School Officials filed a near-identical motion to dismiss, raising no new issues.[15] It was not until the District

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[15] The School Officials filed the renewed motion to dismiss in response to Brittany's First Amended Complaint. However, the District Court found that the Amended Complaint contained no substantive changes, which accounts for its further conclusion that the School Officials'

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Court dismissed this second motion to dismiss, five months later, that the School Officials filed their interlocutory appeal.

The lower court, relying on *Knox v. Southwest Airlines*, 124 F.3d 1103, 1106 (9th Cir. 1997), held that an appellant was permitted to toll the clock in this manner. However, this ruling does not comport with other Circuits' interpretation of Rule 4's jurisdictional requirement.

Phillips v. Montgomery County, 24 F.3d 736 (5th Cir. 1994), is a case similar to the instant one. There, as here, the District Court denied the defendants' motion to dismiss on qualified immunity grounds. *Id.* at 737. There, as in the present case, the plaintiffs filed an amended complaint that was "identical to the [previous] complaint except that one plaintiff had been eliminated and two new ones had been added." *Id.* There, as here, defendants filed a second motion to dismiss. *Id.* When the District Court again denied the motion "[b]ecause defendants ha[d] not provided any new grounds to dismiss," the defendants noticed an appeal of the District Court's second order. *Id.* Because the Notice of Appeal was not filed within 30 days of the original Order, the Fifth Circuit dismissed the appeal. *Id.* at 737. The court explained: "defendants may not fail to appeal an order denying them immunity and then restart the 30-day clock by refiling the same motion." *Id.* (citations omitted). A second motion, the court

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renewed motion contained no new arguments. *See* Jun. 18, 2007 Order (App. 65.)

concluded, does not interrupt the 30-day period to appeal "where the second motion raises substantially the same grounds as urged in the earlier motion." *Id.* at 738 (citation omitted); *see also Armstrong v. Texas State Board of Barber Exam'rs*, 30 F.3d 643, 644 (5th Cir. 1994) (holding that an additional motion to dismiss an amended complaint brought before the start of discovery will not restart the clock since such a motion "is primarily a vehicle to test the sufficiency of pleadings as to qualified immunity").

The First, Eighth and Eleventh Circuits have similarly rejected attempts by appellants to evade the 30-day time limit by filing and "appealing" motions substantively identical to those already rejected by the trial court. *See Pruett v. Choctaw County, Ala.*, 9 F.3d 96, 97 (11th Cir. 1993) (holding that defendants could not appeal from the District Court's denial of a second motion since "the district court did not ... take any other steps indicating that it had reopened the immunity issue ... [but] [r]ather ... determined that there was no cause to revisit its previously entered order"); *Taylor v. Cater*, 960 F.2d 763, 764 (8th Cir. 1992) (holding that a defendant may not "repeatedly file the same motion with a district court thereby starting a new clock running for the purposes of appeal"); *Fisichelli v. City Known As Town of Methuen*, 884 F.2d 17, 19 (1st Cir. 1989) (holding that defendants may not restart the clock by filing a second, identical motion). This rule makes sense on practical grounds and from the standpoint of judicial economy. As the Eighth Circuit explained in *Taylor*:

> If we were forced to entertain appeals . . . whenever a defendant had

> unsuccessfully sought reconsideration, the district court's trial calendar would be bemired; Rule 4(a)(1) would be stripped of all meaning; the uncertain business of qualified immunity would be made measurably more problematic; and a dilatory defendant would receive not only his allotted bite at the apple, but an invitation to gnaw at will.

Taylor, 960 F.2d at 764 (citations omitted).

II. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 18, 2009

No. _____

In The
Supreme Court of the United States

BRITTANY McCOMB and MARIANNA McCOMB,
by her best friend, CONSTANCE J. McCOMB,

Petitioners,

v.

GRETCHEN CREHAN, ROY THOMPSON, and CHRISTOPHER SEFCHECK, individually and in their official capacities as employees of Foothill High School, and the Clark County School District, a political subdivision of the State of Nevada, and WALT RUFFLES, in his official capacity as Superintendent of the Clark County School District, a political subdivision of the State of Nevada, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

APPENDIX

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 07-16194
D.C. NO. CV-06-00852-RCJIPAL

MEMORANDUM*

BRITTANY McCOMB; MARIANNA McCOMB; CONSTANCE J. McCOMB,

Plaintiffs - Appellees,

v.

GRETCHEN CREHAN; ROY THOMPSON; CHRISTOPHER SEFCHECK; WALT RULFFES,

Defendants - Appellants.

Appeal from the United States District Court
for the District of Nevada
Robert C. Jones, District Judge, Presiding

Argued and Submitted March 10,2009
San Francisco. California

Before: **KOZINSKI,** Chief Judge, **HUG** and **BEA,** Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

We have jurisdiction over this appeal, Knox v. Southwest Airlines, 124 F.3d 1103, 11 06 (9th Cir. 1997), and can consider the merits of defendants' arguments, Hydrick v. Hunter, 500 F.3d 978, 986 (9th Cir. 2007). Defendants did not violate McComb's free speech and free exercise rights by preventing her from making a proselytizing graduation speech. Cole v. Oroville Union High School District, 228 F.3d 1092, 1101 (9th Cir. 2000); Lassonde v. Pleasanton Unified School District, 320 F.3d 979, 983 (9th Cir. 2003). Nor did they violate McComb's right to equal protection; they did not allow other graduation speakers to proselytize.

REVERSED and REMANDED for dismissal of the claims that are the subject of this appeal.

CLARK COUNTY SCHOOL DISTRICT
REGULATION

6113.2

SECTARIANISM, RELIGIOUS FREE SPEECH AND RELIGIOUS HOLIDAYS

I. No public school funds shall in any way be used to benefit sectarianism and no books or papers of a sectarian or denominational character may be used to promote a particular religion or sect.

II. Clark County School District employees shall not promote nor permit the promotion of sectarianism within the schools.

III. Student initiated non-school sponsored religious speech is acceptable in the public schools in the same manner as other free speech.

IV. School officials may not mandate or organize prayer at graduation or other extracurricular activities or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and, therefore, may not be restricted because of its religious (or anti-religious) content. To avoid any

mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech is not school sponsored.

V. Religious holidays may be observed only to the extent that such observances interpret the customs and traditions of a culture and may not provide opportunities for religious indoctrination. Songs and customs commonly accepted in the American way of life, even though such songs and customs may have been of a religious nature, are considered to be cultural traditions.

VI. Care should be taken not to schedule major examinations or significant single event student activities on major religious holidays.

VII. Administration will see that this information is disseminated and understood.

Legal Reference: NRS Chapter 388 System of Public Instruction, Section 150
Review Responsibility: Instruction Unit
Adopted: [6115.2: 7/11/63]
Revised: (9/1/78; 8/13/81; 2/11/82; 3/9/93; 5/11/93; 11/23/93; 7/26/94; 4/10/03)
Pol Gov Rev:

Commencement Speeches

Suggestions

Try to include the following in your speech:

1. Start with some imagery or metaphorical comparison.
2. Say things that come from the heart.
3. Reflect over past experiences and lessons learned. Things that bind us to one another.
4. Reflect about the world today. How should we prepare for the future?
5. Reflect on how you can help the world. What can you add as a person or group?
6. Reflect on what you want out of life. What do you want for others?
7. Interject HOPE.
8. Tie together the beginning and end with some metaphorical comparison or imagery.
9. OMIT "Thank you..." (Written reflections printed in program).

Length: 1 – 2 minutes

Books of Quotations:

Bartlett's Familiar Quotations
The Home Book of Quotations by Stevenson
Dictionary of Quotations by Evans
Oxford Dictionary of Quotations.

Written Reflections

1. More personal
2. Include "Thank You"
3. Limited to 200 words
4. Be careful not to forget someone if you are going to list a lot of names in your written reflection.

ROUGH DRAFTS DUE TO Mr. Thompson
WEDNESDAY, MAY 3, 2006

Filling that Void
By: Britany McComb

Do you remember those blocks? The ones you would fit into cut-outs to learn all the different shapes? The ones you used to play with before kindergarten, during the good old, no grades, no pressure preschool days? I find it funny how easily amused we are as children. Many of us would have sat on the story rug for hours with those blocks trying to fit the circle into the square cut-out if it wasn't for the aid of a teacher.

As one of the valedictorians for our senior class you would think I caught on to which blocks fit into which cut-outs quickly. But, to be upfront, it took me awhile. Up until my freshman year in high school I was still attempting to fill certain voids with shapes that were often peculiar and always too small.

The main shape I have wrestled with over the years is my accomplishments. They began to define my self-worth at a young age. Swimming competitively was one of these achievement blocks. If I took third in a competition rather than first, I felt I hadn't met the mark, that I had failed. But strangely enough if I took first I would belittle my success and even first place left me feeling empty and unfulfilled. Either way the shape entitled "accomplishments" was too small to fill the void constantly reminding me there was something more, something more than me and what I made of my life, something more than my friends and what they made of their own lives.

The summer after my freshman year I quit swimming. I quit trying to fill the huge void in my soul with the meager accomplishments I managed to obtain in swimming. After quitting this amazing sense of peace came over me and I realized after fifteen years of sitting on the story time rug there was a teacher there trying to help me- God. I had ignored Him all these years and He was just trying to show me what shape fits into the cut-out in my soul.

This hole couldn't be filled with swimming, with friends, with family, with dating, with partying, with drinking, with anything but God. His love is "that something more" we all desire. It's unprejudiced, it's merciful, it's free, it's real, it's huge and it's everlasting. God's love is so great that He gave His only son up to an excruciating death on a cross so His blood would cover all our wrongdoings and our relationship with Him could be restored. And he gives us a choice- to live for ourselves or to live for something greater that [illegible] eternity and His love.

IDENTIFIES A PARTICULAR RELIGION

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Ditto

This is why Christ died. John 10:10 says He died so we no longer have to reach and fall short, so we can have life "and life to the fullest." I now desire not my own will but the will of God for my life- however crazy and extravagant, or seemingly mundane and uneventful that might be. Strangely enough, surrendering my own will for the will of God, giving up control, gave me peace, gave me a calm I can't even begin to express with words.

Four years ago becoming valedictorian would have been just another effort to fit the circle into the square cut-out, but because my heart is so full of God's love the honor of speaking today is just that- an honor. Without it I would feel just as full and purposeful as I do at this moment. And I can guarantee 100%, no doubt in my mind, that if you choose to fill yourself with God's love rather than the things society tells us will satisfy us, you will find success, you will find your self-worth. You will thrive whether you sweep a prestigious university, pass bill and become a successful career man or woman or begin a life long manager position at McDonald's tomorrow. Because the fact is man has an innate desire to be apart of something greater than himself, and something is God's plan. And God's plan for each of our lives may not leave us with an impressive and extensive resume, but it will pursue His plan. He promises to fill us. Jeremiah 29:11 says, "'For I know the plans I have for you,' declares the Lord, 'plans to prosper you and not to harm you, plans to give you a hope and a future'. Trust me, this circle's

Prosperity

Janelle Oehler: "And, of course, our meal is never started without prayer. My Heavenly Father plays an extremely important role in my life. I am confident that I would not be standing before you today if I had not included Him in my life. He is the One who truly understands our individual needs. He is always there to listen, to lead, to guide, *and to give me strength I need to keep, when I need, and t give me the strength* that I need to keep on going when I no longer believe I can. I would be nothing without Him. Find your inspiration. Living with the hope for a brighter future will make a significant difference in our lives, provide us with true inner happiness and personal success. If we strive to be more motivated by inspiration, we will find ourselves more satisfied, as if we had enjoyed a complete balanced and nutritional spaghetti dinner. Our next valedictorian speech will be delivered by Dallin Trout."

Dallin Trout: "Hello. Hello, my name is Dallin Trout, and I'm proud to come before you this day as one of the Foothill High School valedictorians. Well, this day has finally come. With all the struggle, with all the effort that we have given, it is finally time for us to graduate. It seems so long ago that we were little freshman, wondering around a huge new world. We have grown in so many ways since then. We have grown older, taller, and, I hope, a little smarter. In fact, these are just a few of the ways that we have grown. In reality, the true number of ways that we have grown is far greater. However, I think it is sufficient enough to simply say that we have outgrown this part of our lives. However, that is not to say that we have reached the limit of out potential. Although this graduation marks the end of this path that we have taken, we now stand at the crossroads of many more. We now stand at the threshold of the rest of our lives. Will we become that lawyer we have dreamt of becoming, fighting for truth and justice? Will we become the doctor dedicated to saving lives? Or perhaps we do not yet know the path we will take, and can only trust in ourselves to make the right decision. Either way, we have a responsibility both to ourselves and to each other to become all that we can. We are all the youth of this proud nation, that has placed all of its trust in us. We would do well not to betray that trust. It is now time for us to take that first step into a new world. It is time to take chances, take risks, come out of top. It is time for us to graduate."

Principal Crehan: "The paths you will take through life will be varied. Some of the legs of your journey may be short and simple, while others may be long and cumbersome. Some will follow the lead of the speaker in Robert Frost's poem *The Road Less Traveled, and the Roads Less Traveled By*. And that will make all the difference. Others will take more familiar roads, and those paths too will make all the difference. In the end, what will be most important, it that the paths you have chosen, will end in realization of your dreams and aspirations. Never lose sight of your dreams, because they will propel you in the right direction. As you take flight today as Foothill Falcons, always remember that what you dream you can become. When you leave today's ceremony, having reached the end of one path in the journey of life, my hope is that you will savor the moment, enjoy each day, never lose your appetite for learning, invite love and laughter into your life, open your heart and mind, and reach for the stars. As principal, it is my pleasure to present the Foothill High School graduating class of 2006. This is to certify that these students have completed the credit requirements prescribed by the School Board of Trustees of the Clark County School District, and the Nevada State Department of Education. I will now ask that Mary Beth Scow, Board of School Trustees, come forward

Mary Beth Scow: "Thank you. It's an honor to be here today to receive this class and to recognize the many accomplishments that they have made to the last thirteen years. Graduations are a wonderful time to be together with family friends, to honor the students. I want to commend your principal, Mrs. Crehan, for her outstanding preparation. She has followed district policies and regulations. I want to also commend the teachers that have made it possible for you to have this education. Parents and friends, we appreciate your attendance here tonight. Parents, I know that this is a bittersweet moment. I've had several children graduate and know that we are working their whole lives to prepare them for adulthood, and then when they're finally there, it tugs at our hearts. Students, we all want what is best for you. We hope that you will take this preparation that you have had, and work to reap the opportunities that you will have in life. There is a Chinese proverb that says that luck is when preparation meets opportunity. We hope you'll continue to prepare yourselves and be ready for those opportunities. One last thing: we hope that you'll have joy and purpose in your lives; and one thing that I think a person realizes as they get older, is how important relationships are. In the low times of our lives and the end of our lives, not much matters but the people around us and our families. So we hope that you'll take great care of those relationships that you have. And now as you stand of the brink of adulthood, I'd just like to leave two things with you that I say to my children everyday as they leave for school: do your best, and do what is right. And now, it is my great privilege as your representative on the Board of School Trustees, to receive Foothill High School class of 2006. Congratulations."

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EXCERPTS OF MINUTES

MINUTES
CLARK COUNTY SCHOOL DISTRICT
REGULAR MEETING OF THE BOARD OF SCHOOL TRUSTEES
EDWARD A. GREER EDUCATION CENTER, BOARD ROOM
2832 E. FLAMINGO ROAD, LAS VEGAS, NV 89121

Thursday, February 27, 2003 5:37 p.m.

Roll Call: Members Present
Sheila R. Moulton, President
Denise Brodsky, Vice President
Susan Brager-Wellman, Clerk
Ruth L. Johnson, Member (via teleconference)
Mary Beth Scow, Member
Carlos Arturo Garcia, Superintendent

Members Absent
Larry Mason, Member
Shirley Barber, Member

INVOCATION
Cantor Joel Gordon, Congregation Shirat Emet in Boulder City.

FLAG SALUTE
Student representatives led the Pledge of Allegiance.

ADOPT AGENDA
Adopt agenda except delete number 17 of Item 18-2, Reference F.
Motion: Brager-Wellman Second: Brodsky Vote: Unanimous

OFFICE OF GENERAL COUNSEL
None.

APPROVE NOTICE OF INTENT—CLARK COUNTY SCHOOL DISTRICT POLICY 6113.2
Approval of the Notice of Intent to Adopt, Repeal, or Amend Clark County School District Policy 6113.2, Sectarianism and Religious Holidays, prior to submission to the Board of School Trustees for approval on March 27, 2003, as recommended in Reference C.

Motion: Brager-Wellman Second: Scow Vote: Unanimous

APPROVE NOTICE OF INTENT—CLARK COUNTY SCHOOL DISTRICT REGULATION 6113.2
Ms. Brodsky asked if Regulation 6113.2 was repealed, would the board be in violation of the No Child Left Behind Act.

Bill Hoffman, general counsel, Legal Office, stated that the regulation as currently written would allow

student led invocation and benediction in graduations under certain circumstances. He said that due to a Supreme Court case such prayers would be unconstitutional and so he recommended this language be deleted. He said that the regulation as it was currently written was sent to the Attorney General to review and her opinion was that the regulation was unconstitutional. He said that a change in the regulation needed to be made and failure to do so would make the district noncompliant with HR-1.

Mrs. Moulton stated she would like to leave the policy as it is and possibly place a disclaimer such as "Schools may issue neutral disclaimers to avoid any erroneous perception that student or private speech is attributable to the school." She asked how many graduation ceremonies in the last year had any kind of benediction or invocation.

Mr. Hoffman responded none that he knew.

Mrs. Moulton asked if it would be acceptable if a speaker at an invocation offered a prayer-like speech.

APPROVE NOTICE OF INTENT—CLARK COUNTY SCHOOL DISTRICT REGULATION 6113.2 (continued)

Mr. Hoffman stated that the U.S. Department of Education has issued some guidelines, which says that where students or other private graduation speakers are selected on the basis genuinely neutral, even-handed criteria, those individuals retain primary control over the content of their expressions.

Then that expression is attributable to the school because the students have retained control of that and, therefore, that free speech could not be restricted. He said that if a principal gave permission for the valedictorian to say whatever they wanted at a graduation, then whatever the student said would not be a result of school sponsorship or district sponsorship. It would be free speech and not subject to censorship. Mr. Hoffman said it is his experience that administration does review the comments that are going to be made by student speakers at graduations to make sure that the comments are appropriate in terms of not being profane, unreasonably critical, or controversial. He said that once the administration reviews the comments, it becomes school or district sponsorship and it would be their responsibility if confronted with what is clearly a religious activity or a prayer, to tell the student that they could not do that. If the student conducts the activity or prayer anyway, it would not be the result of a school sponsorship or district endorsement.

Mrs. Scow asked if it would possible to have a disclaimer printed on the program at graduation.

Mr. Hoffman said yes, but that would not solve the question of whether or not the administration was involved in reviewing the comments ahead of time. He said once the comments are reviewed, then it does not matter. If the comments were not reviewed, then a disclaimer could be issued and it would show

that there was not sponsorship of whatever is said by the student.

Ms. Brodsky stated she is concerned that by deleting this language, the students would not feel free to express themselves.

Mr. Hoffman stated that the portion of this regulation being deleted allows invocations and benedictions during school graduations. He said that what a student says for a particular success they might have had is probably going to fall in the area of free speech and going to be allowed under paragraph 3. He said that a student who is in a position to lead the public in prayer at a graduation during an invocation and a benediction is the only thing being taken out of this regulation.

Mrs. Brager-Wellman stated that she feels that the board should follow Policy Governance and since this regulation is under the auspices of the superintendent, the board should not have to vote on it.

Mr. Hoffman stated that this regulation is a board regulation and the superintendent could not change it.

Mrs. Moulton stated that she could not support any action on this item at this time.

Dr. Bersi, board counsel, stated that she does not feel the board has a choice whether to approve this regulation or not. She said that it is on record that the opinion of the Attorney General, a strong Ninth

Circuit case, and the U.S. Supreme Court says that this language cannot be in this regulation.

Mr. Garcia stated that the board would be jeopardizing federal funding under HR-1 by not approving the revision of this regulation.

APPROVE NOTICE OF INTENT—CLARK COUNTY SCHOOL DISTRICT REGULATION 6113.2 (continued)

Ms. Brodsky stated she does not understand how the original language jeopardizes federal funding.

Mr. Hoffman read the last paragraph of the Attorney General's opinion in this case: "Clark County School District Regulation 6113.2, which authorizes student initiated school prayer at commencement exercises, violates the establishment clause of the First Amendment of the U.S. Constitution." Mr. Hoffman stated that he encourages the board to approve this notice of intent which would lead to the final conclusion in two weeks because he feels the board does not have many choices in view of what the Attorney General has very clearly said.

Mrs. Johnson stated that she does not agree that the board does not have a choice. She said she feels that the board should choose what they feel is the right choice, at the right time, for the right reasons and to stand up and fight for it.

Approval of the Notice of Intent to Adopt, Repeal, or Amend Clark County School District Regulation 6113.2, Sectarianism, Religious Free Speech and

Religious Holidays, with the modification that staff review and possibly change some of the language prior to submission to

the Board of School Trustees for approval on March 27, 2003, as recommended in Reference D, under duress.
Motion: Brager-Wellman Second: Scow
Vote: Ayes–2 (Brager-Wellman, Scow)
Noes–3 (Johnson, Moulton, Brodsky)

Motion failed.
* * * * *

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRITTANY McCOMB, and CONSTANCE J. McCOMB, individually and as next friend of MARIANNA McCOMB, a minor,

Plaintiffs,

vs.

GRETCHEN CREHAN, individually and in her official capacity as Principal of Foothill High School, Clark County School District, a political subdivision of the State of Nevada, ROY THOMPSON, individually and in his official capacity as Assistant Principal of Foothill High School, Clark County School District, a political subdivision of the State of Nevada, CHRISTOPHER SEFCHECK, individually and in his official capacity as an employee of Foothill High School, Clark County School District, WALT RULFFES, in his official capacity as Superintendent of the Clark County School District, a political subdivision of the State of Nevada, DOES 1 through 50, inclusive, and ROE CORPORATIONS 51 through 100, inclusive,

Defendants.

Civil Action No.: 06-852

FIRST AMENDED COMPLAINT FOR DAMAGES PURSUANT TO 42 U.S.C. § 1983 et

seq., 42 U.S.C. § 2000A et seq. and CLAIMS FOR INJUNCTIVE AND DECLARATORY RELIEF

JURY TRIAL DEMANDED

INTRODUCTION AND PRELIMINARY STATEMENT

This action seeks vindication of the First and Fourteenth Amendment rights of Plaintiffs Brittany McComb (hereinafter referred to as "Brittany," "Plaintiff" or "Plaintiff Brittany McComb" as the context so denotes), a class of 2006 valedictorian of Foothill High School, who was silenced on June 15, 2006 before 400 graduates and their families in the middle of delivering her valedictory speech at graduation. Under the forum rules established by the school system, Brittany's stellar academic performance qualified and entitled her to address her classmates at graduation in her own words, yet the Defendants, and each of them, sought to censor her speech, coerce her into giving a different speech in violation of her conscience, and interfere with and censor the delivery of her speech, all based upon her religious belief and viewpoint. It also seeks to vindicate the rights of Brittany's mother, Constance J. McComb, and her sister, Marianna McComb, a student at Foothills High School, to hear Brittany's speech at the 2006 Foothills High School graduation unrestricted by unconstitutional censorship, and to hear otherwise constitutionally permissible speech at future Clark County High School graduations likewise unrestricted by unconstitutional censorship. The fundamental guarantees of the First and

Fourteenth Amendments forbid such discrimination and censorship and require this Court to grant the relief requested herein. This action also seeks to enforce rights granted to the Plaintiffs under Title II of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000a et seq. ("Title II") which proscribe discrimination on the basis of religion in a place of public accommodation.

Jurisdiction and Venue

1. That this Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343, as it is an action seeking redress under the laws and statutes of the United States for rights secured by the Constitution and laws of the United States.

2. That venue properly lies in the District of Nevada under 28 U.S.C. § 1391(b), as the Defendants reside within this District, all Defendants reside within the State of Nevada, and a substantial part of the events giving rise to this action occurred within this District.

Parties

3. That the Plaintiff, Brittany McComb, is an adult resident of the County of Clark, State of Nevada, who at all times relevant to this Complaint was a student at Foothill High School, a division of the Clark County (Nevada) School District, which is a political subdivision of the State of Nevada. Brittany attended the 2006 Foothills High School graduation and intends to attend future high school graduations and assemblies held in facilities of, and/or sponsored by, the Clark County School District.

3A. That the Plaintiff Constance J. McComb is an adult domiciliary and resident of Clark County, State of Nevada, the parent and guardian of Plaintiffs Brittany McComb and Marianna McComb, a registered voter and taxpayer in Clark County, State of Nevada, and attended the 2006 Foothills High School graduation and intends to attend future high school graduations and assemblies held in facilities of, and/or sponsored by, the Clark County School District.

4. That the Plaintiff, Marianna McComb (hereinafter referred to as "Marianna"),is a minor and a resident of the County of Clark, State of Nevada, who at all times relevant to this Complaint was a student at Foothill High School, a division of Clark County (Nevada) School District, which is a political subdivision of the State of Nevada. Marianna attended the 2006 Foothills High School graduation and intends to attend future high school graduations and similar assemblies held in facilities of, and/or sponsored by, the Clark County School District, including the commencement ceremony which she graduates from Foothill High School. Suit is brought on her behalf by her next friend, parent and guardian, Constance J. McComb.

5. That Defendant Gretchen Crehan is and was at all times relevant to this Complaint the duly appointed and acting Principal of Foothill High School, a division of the Clark County (Nevada) School District, which is a political subdivision of the State of Nevada. In all instances set forth in this Complaint, Defendant Crehan acted under color of the law of the State of Nevada. Defendant Crehan is

sued in this case in both her individual and official capacities.

6. That Defendant Roy Thompson is and was at all times relevant to this Complaint a duly appointed and acting Assistant Principal of Foothill High School, a division of the Clark County (Nevada) School District, which is a political subdivision of the State of Nevada. In all instances set forth in this Complaint, Defendant Thompson acted under color of the law of the State of Nevada. Defendant Thompson is sued in this case in both his individual and official capacities.

7. That Defendant Christopher Sefcheck is and was at all times relevant to this Complaint an employee of Foothill High School, a division of the Clark County (Nevada) School District, which is a political subdivision of the State of Nevada, and was the person employed by the said school district, *inter alia*, to censor speech and control the microphone and amplification system at Foothill High School's 2006 graduation ceremony. In all instances set forth in this Complaint, Defendant Sefcheck acted under color of the law of the State of Nevada. Defendant Sefcheck is sued in this case in both his individual and official capacities.

7A. That Defendant Walt Rulffes was at all times relevant to this Complaint the duly appointed Superintendent of the Clark County Public Schools, Clark County (Nevada) School District, which is a political subdivision of the State of Nevada. In all instances set forth in this Complaint, Superintendent Rulffes acted under color of the law

of the State of Nevada. Superintendent Rulffes is sued in this case in his official capacity.

8. That Defendants DOES 1 through 50, inclusive, and ROE CORPORATIONS 51 through 100, inclusive, are individuals and entities of unknown form whose names and capacities are unknown to the Plaintiffs who therefore sue said Defendants by the stated fictitious names. The Plaintiffs are informed and believe, and thereon allege, that each of the Defendants designated as DOE or ROE, are in some manner responsible in whole or in part for the transactions and occurrences alleged herein and through their conduct caused damages to the Plaintiffs as more fully set forth in the facts, circumstances and events described herein. The Plaintiffs are further informed and believe, and thereon allege, that each of the Defendants designated as DOE or ROE, acted in concert with the named Defendants and/or engaged in, and/or intend to engage in, the conduct of the Defendants complained of herein. Plaintiffs are further informed and believe, and thereon allege, that each of the Defendants designated as DOE or ROE who receive actual notice of any injunctive order by personal service or otherwise, and/or who, upon information and belief, are employees and/or agents of the Foothill High School, a division of Clark County (Nevada) School District, which is a political subdivision of the State of Nevada, all of whom act, acted or intend to act under color of law of the State of Nevada and participate, participated and/or intend to participate with the named Defendants in one or more of the unlawful actions described in this Complaint. Each of the Defendants designated as DOE or ROE are sued in this case in both their

individual and official capacities. Plaintiffs will seek leave to amend this Complaint to insert the true names and capacities of DOES 1 through 50, inclusive, and ROE CORPORATIONS 51 through 100, inclusive, when Plaintiffs ascertain them.

Factual Allegations
A. Brittany and Marianna McCombs' Matriculation at Foothill High School

9. That Plaintiffs Brittany McComb and Marianna McCombs were enrolled at and attended Foothill High School, located in Clark County, Nevada, during the 2005-2006 school year, Brittany as a senior and Marianna as a sophomore.

10. That Foothill High School is a public secondary school located in Clark County, Nevada, and is under the control and supervision of the Board of Trustees of the Clark County School District and operated under authority delegated by the Trustees to Superintendents, Principals, administrators and other personnel. Upon information and belief, as of 2005, the Clark County School District was the fifth (5th) largest school district in the United States.

11. That Foothill High School is a division of the Clark County School District, a governmental entity created by and exercising powers under the laws of the State of Nevada, specifically N.R.S. § 386.010, and is deemed a political subdivision of the State of Nevada pursuant to N.R.S. § 386.010(2).

12. That based upon the number of credits she had earned, Brittany McComb was scheduled to

graduate and to receive a high school diploma from Foothill High School in June, 2006.

13. That Brittany did graduate and received her high school diploma at ceremonies conducted by Foothill High School and the Clark County School District on June 15, 2006 at the "Orleans Arena" located at "The Orleans Hotel & Casino" located in Las Vegas, Nevada.

14. That during her four (4) years at Foothill High School, Brittany excelled and achieved a 4.7 grade-point average.

15. That Brittany's academic performance qualified her, along with two (2) other students, Janelle Oehler and Dallin Trout, as class valedictorians, signifying that they had achieved the highest grade-point average in their high school class.

B. The School's Selection of Valedictory Speakers for Its High School Graduation Ceremonies

16. That Foothill High School has a custom, policy, and practice of inviting the valedictorian(s) of each year's graduating class to give a speech and address classmates, parents, and others at its annual graduation ceremonies.

17. That the selection of a student or students to give the valedictory address at graduation ceremonies is based solely on the neutral criteria used by the school system in determining which student or students achieved the highest

grade-point average during his or her high school educational career.

18. That no other factors or criteria, such as content, skill of presentation, popularity, student vote, viewpoints, participation in extracurricular activities, or honors, are used by school officials to determine who is selected to give the valedictory address(es) at graduation ceremonies.

19. That once selected, valedictorians are asked to personally compose a speech, address, or remarks they will give at graduation ceremonies.

20. That as a matter of custom and practice, the school and district officials offer suggested topics for students for their valedictory speech(es), but do not ask or offer to prepare the speech, address, or remarks that a valedictorian offers at graduation ceremonies.

20A. A copy of the "Commencement Speeches Suggestions" given to the student commencement speakers, including Plaintiff Brittany McComb, for the 2006 Foothills High School graduation is attached hereto as Exhibit "1."

21. That students at Foothill High School, their parents, and members of the public recognize, know and understand that a valedictorian who gives a speech and address at graduation ceremonies is chosen solely because of her or his academic achievement and is not chosen as a spokesperson for Foothill High School or the Clark County School District.

22. That students at Foothill High School, their parents, and members of the public attending graduation ceremonies recognize, know and understand that a valedictorian who gives a speech or address at graduation ceremonies is speaking as a private individual and is reciting a speech or address the content of which is personally prepared by the Valedictorian.

22A. That students at Foothill High School, their parents, and members of the public attending graduation ceremonies in the Clerk County School District recognize, know and understand that except as expressly acknowledged by the person engaging in expression, speakers who engage in expression at graduation ceremonies personally prepare and/or express the content of speech as private individuals and not as spokespersons of, or with the endorsement of, the Clark County School District or any other governmental entity.

23. That Section 9524 of the Elementary and Secondary Education Act ("ESEA") of 1965, as amended by the No Child Left Behind Act of 2001, requires the Secretary [of Education] to issue guidance on constitutionally protected prayer in public elementary and secondary schools. The Secretary of Education has previously issued such guidance as follows:

> School officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other private graduation speakers are selected on the

> basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's.

Essentially reflecting the guidance as promulgated by the Secretary of Education, Clark County School District Regulation 6113.2(IV) expressly provides as follows:

> School officials may not mandate or organize prayer at graduation or other extracurricular activities or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and, therefore, may not be restricted because of its religious (or anti-religious) content. To avoid any mistaken

perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate neutral disclaimers to clarify that such speech is not school sponsored.

24. That other duly adopted regulations of the Clark County School District Regulations prohibit content-based censorship of religious references in documents pertaining to American history or heritage (Reg. 6124.4), provide equal opportunity for presentation of the viewpoints of political candidates in the schools (with equal access guarantees in presenting platforms to students) (Reg. 6124.3), establish programs for the exhibition and staging of student artwork at convenient locations and times to permit viewing by students (Reg. 6163), impose a mandatory period each day in class for "individual meditation, prayer or reflection by students" (Reg. 6113.1), recognize Sunday as a day free from the demands of educational pursuits (Reg. 6113.2), encourage assemblies and public programs to widen and deepen student interest and recognize publicly worthwhile achievements, with wide participation in such programs (Reg. 6130), and declare that student initiated, non-school sponsored religious speech is acceptable in the public schools in the same manner as other free speech" (Reg. 6113.2).

C. The Selection of Brittany McComb as Valedictorian and Graduation Speaker

25. That in April, 2006, Brittany McComb was told by Defendant Thompson that she was one of three students who had qualified as valedictorian for Foothill High School's Class of 2006.

26. That when he informed Brittany of her achievement, Defendant Thompson told her that it was expected that she would give a speech or address at graduation ceremonies in June, 2006.

27. That Defendant Thompson, who along with Defendant Crehan, was in charge of the planning and execution of the Foothill High School graduation ceremonies of June 15, 2006, informed Brittany that she should prepare a speech or address that expressed her personal thoughts about her experience at Foothill High School and communicated to her classmates a message that was of importance to her.

28. That Brittany McComb was a devout Christian throughout her high school years and before, and after a long period of personal struggle the most important part of her life became her personal belief in Jesus Christ.

29. That Brittany's sincerely-held religious beliefs are an integral part of her life and require her to tell the truth about her life.

30. That in accordance with her sincerely-held religious beliefs, Brittany believes as a matter of conscience that any important remarks she makes

about her life and experiences must include a reference to the role of God in her life and, in this regard, attributes her success in high school to the filling of what she perceived as an otherwise empty void in her life with God and His purposes and plan for her life.

31. That Plaintiffs Constance J. McComb and Marianna McComb share the sincerely-held religious beliefs of Brittany McComb.

D. The Censorship of Brittany's Graduation Speech

32. That in early May, 2006, Brittany prepared a speech to deliver at graduation describing a sincere message of her experiences and the significant change in her ideas and beliefs that became important to her in her years at Foothill High School.

33. That Brittany's speech, entitled "Filling that Void," referred to the emptiness she experienced from accomplishments, achievements, and failures in her early high school years, and the fulfillment and satisfaction she later came to experience in something greater than herself, namely, in God, God's love, and Christ.

34. That on or about May 3, 2006, Brittany gave a printed copy of the speech she had written and desired to give at the graduation ceremonies to Defendant Thompson.

35. That approximately one (1) week later, Defendant Thompson informed the Plaintiff that the

speech would be submitted for review by an attorney for the Clark County School District, Jon M. Okazaki, Esq. Attorney Okazaki is Assistant General Counsel for the Clark County School District.

36. That Defendant Thompson informed Brittany that the review by attorney Okazaki was being done because of the references to religion in her speech.

37. That Defendant Thompson told Brittany that he didn't know what would be kept and what would be edited out, but attorney Okazaki would make those decisions.

38. That Defendant Crehan explained to Brittany that what was offensive to the Clark County School District about the speech was the mention of Jesus Christ.

39. That soon thereafter, Brittany was called to a meeting with Defendants Crehan and Thompson in Defendant Crehan's office.

40. That at the meeting, the printed copy of the speech Brittany had written was returned to her with substantial passages circled, crossed out and censored.

41. That the circled and crossed out portions constituting more than one-third of the lines in the speech, were separately annotated with handwritten notes of presently unknown origin, stating: "IDENTIFIES A PARTICULAR RELIGION," then "DEITIES," and then

"PROSELYTIZING." A copy of the printed version of the speech returned to Brittany is attached hereto as Exhibit "2", which by this reference is incorporated herein and made a part hereof.

42. That Brittany was told by Defendants Crehan and Thompson that she could not deliver the speech she had written because of the religious references in the portions of the speech that had been crossed out or marked through.

43. That Defendants Crehan and Thompson told Brittany to change the speech and resubmit it to them for further review.

44. That Defendants Crehan and Thompson gave Brittany the telephone number for attorney Okazaki and explained that she could contact him and he would give the reasons why the speech had to be cut up and approved.

45. That notwithstanding the illegal judgments and determinations made by the Defendants, Brittany's speech was a simple rendition of the details of her important life experiences during high school, that resulted in her moral fulfillment and her successful high school career, and did not constitute unlawful religious proselytizing.

E. Brittany's and Constance J. McComb's Remedial Efforts and Brittany's Struggle Of Conscience

46. That Brittany informed her parents (with whom she resided) of what had occurred at the meeting with the Defendants and of the fact that she had been told that she could not give the remarks that had been deleted from her speech.

47. That Brittany's mother, Constance J. McComb, called attorney Okazaki to request an opportunity to speak about the Defendants' order that Brittany not give the deleted portions of her "Filling that Void" speech.

48. That between the time she was informed of the Defendants' order and June 15, 2006, Constance J. McComb called the office of attorney Jon M. Okazaki approximately four (4) times in order to arrange a meeting or discuss the matter with him, but attorney Okazaki never returned her calls.

49. That between the time Brittany was informed of the Defendants' order and June 15, 2006, Brittany and her parents diligently attempted to meet with School District officials or its attorney to discuss the order forbidding Brittany from giving the deleted portions of her speech.

50. That at one point, Defendant Thompson told Constance J. McComb that the School District's attorney did not meet with parents and that the McCombs would have to get an attorney to speak with attorney Okazaki.

51. That based on Defendant Thompson's statement, the McCombs transmitted a copy of the edited speech to Las Vegas attorney Theodore Parker, III, Esq., who advises the business run by Brittany's father, Michael J. McComb.

52. That attorney Parker also attempted to contact the School District or its attorney, in writing and by telephone approximately three (3) times, about the matter, but was unsuccessful in these attempts.

53. That during the last week of May 2006, Defendant Thompson began pressuring Brittany about the speech issue and the redactions made by the Clark County School District and/or attorney Okazaki.

54. That before the last day of classes, Defendant Thompson pulled Brittany aside in the hall and said he needed to know right then about her plans for the speech because he needed to send the final drafts in. Brittany responded she would let him know the next day before school and he said "fine," but due to the immediate pressure and coercion to submit a proposal about her speech, Brittany told Defendant Thompson later that day that she would give the speech she had previously submitted without the passages that had been circled and crossed out.

55. That Constance J. McComb called attorney Okazaki the fourth (4th) and final time on Friday, June 9, 2006 and spoke with his secretary who stated that she didn't see any messages that calls had been made. Constance J. McComb

explained that both she and their attorney had both called and left messages, wanting to make an appointment with attorney Okazaki and that none of the calls had been returned. The secretary stated that attorney Okazaki made his own appointments, and that she would talk with him and call Constance J. McComb back in five (5) minutes. No such call was made.

F. The Censorship At the Foothill High School Graduation Ceremony

56. That on June 15, 2006, Brittany and her parents came to The Orleans, a privately-owned arena and place of public accommodation, for the graduation ceremony.

57. That prior to the ceremony, Brittany was approached by Defendant Christopher Sefcheck, a faculty member at Foothill High School, who informed her that he had been given responsibility for controlling the microphone on stage to be used during the ceremony.

58. That Defendant Sefcheck said he had a copy of the edited version of Brittany's speech.

59. That Defendant Sefcheck told Brittany that he had been instructed that if anyone should deviate from the speeches that had been submitted to Defendants Crehan and Thompson, he had been instructed to cut off the microphone, thereby preventing the speaker from being heard by the audience.

60. That at the time set forth in the ceremony program, Brittany rose from her seat on stage to the podium and microphone to give her speech.

61. That Brittany had memorized the original version of "Filling that Void" and decided, based on her conscience and constitutional right to free speech, to give the original speech.

62. That when Brittany began delivering the first portion of the speech that had been previously censored --- the point of speaking of God's love --- the microphone was cut off by Defendant Sefcheck and she was prevented from being heard by the audience.

63. That as the audience booed the forced silencing of Brittany, Defendant Crehan then approached Brittany and told her that the microphone would not be turned back on and asked her to introduce the next speaker, thus indicating to Brittany that her speech was over. A video copy of Brittany's speech is attached hereto as Exhibit "3", which by this reference is incorporated herein and made a part hereof.

64. That although Brittany earnestly desired to tell all her classmates about the importance that religion played in her life at Foothill High School, and how the void in her early high school years had been filled with a sense of purpose through the love of God and her faith in Jesus Christ, she was prevented from doing so by the censorship and actions of the Defendants, and each of them, all to Plaintiffs' damages.

64A. That the Defendants' actions in censoring and preventing Plaintiff Brittany McComb from giving the speech "Filling that Void" or additional remarks at the Foothill High School graduation ceremony were not reasonable in light of Clark County School District Regulation 6113.2(IV) and the purposes of the graduation ceremony and were contrary to that and other Clark County School District Regulations that permit unrestrained equal access for speech with political, artistic or other content favored by the Defendants and the school system, and, as applied by the Defendants to Plaintiff Brittany McComb, resulted in arbitrary, capricious, and irrational content discrimination among different forms of social, economic, philosophical, political and religious speech and deprived all of the Plaintiffs the right to hear all such expression without impermissible censorship.

64B. That the Defendants' failed to censor, and/or permitted other speakers at the 2006 Foothill High School graduation ceremony to give, speeches that contained a wide variety of religious, political, social, philosophical and economic content, including uncensored speech referring to a deity and/or containing speech that urged the audience to find inspiration in a variety of religious, political, social, philosophical and economic endeavors, while at the same time censoring such references and content in Brittany McComb's speech.

64C. For example, at the same graduation commencement where Brittany McComb spoke, the program included a broad variety of expression, including musical selections, poems, speeches with the entire audience being asked to rise and sing the

National Anthem and to profess the Pledge of Allegiance, and then, several speakers offered a variety of religious, political, social, philosophical and economic observations: Janelle Oehler delivered a valedictory speech with explicit religious sentiments, specifically invoking her deity, speaking of His nature, urging the audience to seek inspiration, and suggesting that the motivation to follow would metaphorically result in a properly balanced life:

> And, of course, our meal is never started without prayer. My Heavenly Father plays an extremely important role in my life. I am confident that I would not be standing before you today if I had not included Him in my life. He is the One who truly understands our individual needs. He is always there to listen, to lead, to guide, and to give me strength I need to keep, when I need, and to give me the strength that I need to keep on going when I no longer believe I can. I would be nothing without Him. Find your inspiration. Living with the hope for a brighter future will make a significant difference in our lives, provide us with true inner happiness and personal success. If we strive to be more motivated by inspiration, we will find ourselves more satisfied, as if we had enjoyed a complete balanced and nutritional spaghetti dinner.

Salutatorian, Danielle Holt, expressed the self-sufficient, humanistic view that "we can steer ourselves in any direction we choose," suggesting that "[w]hatever your goal, you can get there if you are willing to work." Valedictorian Dallin Trout opined that students could "only trust ourselves to make the right decision," advocating that they "take chances, take risks, come out of top." The defendant Principal exhorted graduates to "Never lose sight of your dreams because they will propel you in the right direction." School Board Chair, Mary Beth Scow, defaulted to a Chinese Proverb: "luck is when preparation meets opportunity," and suggested the students take advantage of what luck brings them and "do your best, and do what is right." By permitting the foregoing expression, and censoring Brittany McComb's speech, the Defendants arbitrarily and unconstitutionally discriminated against Plaintiffs.

64D. That upon information and belief, the actions taken by the Defendants were caused by an intra-office memorandum dated April 21, 2003, authorized by the predecessor to, and acquiesced in by, the Defendant Superintendent, requiring school officials to review and censor student speech at commencement exercises, student assemblies, and similar events, notwithstanding Clark County School District Regulation 6113.2(IV).

64E. That the actions required to be taken by the intra-office memorandum dated April 21, 2003, were inconsistent with Clark County School District Regulation 6113.2(IV) and Section 9524 of the ESEA, and caused unnecessary constitutional harm to the Plaintiffs.

64F. That upon information and belief, the Defendants have failed to apply uniformly Clark County School District Regulation 6113.2(IV) and the requirements of the intra-office memorandum dated April 21, 2003, to commencement exercises, student assemblies, and similar events, resulting in arbitrary, unreasonable and unconstitutional application thereof to students and parents in the Clark County School District, including the Plaintiffs, and consequent deprivation of constitutional right.

65. That the Defendants' and each of their actions in the intentional censorship of Brittany's speech, in subjecting her to verbal and mental pressure and coercion and forcing her to agree to revise and rewrite her speech to eliminate her sincerely-held religious views, in making derogatory statements about her sincerely-held religious beliefs, and in publicly humiliating her, and demeaning her speech, by "pulling the plug" on the amplification and instructing her to cease giving the speech before an audience of her peers and their families, deprived Plaintiff Brittany McComb of her constitutional rights, and Plaintiffs Constance J. McComb and Marianna McComb of their constitutional right to hear Brittany's speech, and has caused each of the Plaintiffs undue emotional and mental pain and duress for which they should be compensated.

66. That the Defendants' and each of their actions in the intentional censorship of Brittany's speech, in subjecting her to verbal and mental pressure and coercion and forcing her to agree to revise and rewrite her speech to eliminate her sincerely-held religious views, in making derogatory

statements about her sincerely-held religious beliefs, and in publicly humiliating her, and demeaning her speech, by "pulling the plug" on the amplification and instructing her to cease giving the speech before an audience of her peers and their families, pose a concrete threat to the constitutional rights of Constance J. McComb, Marianna McComb and other students at Foothill High School (a) who may be similarly qualified and situated as Plaintiff and present a valedictory speech at future Foothill High School graduation ceremonies containing reference to a particular religion, a deity or other similar purportedly offensive combinations of words referring to religion, and/or (b) who will otherwise be deprived of hearing constitutionally permissible expression similar to Brittany's at future graduation ceremonies, school assemblies and similar events.

First Cause of Action
Free Speech

67. The Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-66 above as though set forth *in haec verba*.

68. That in all respects relevant to the matters set forth in this Complaint, the Defendants acted under color of the law of the State of Nevada.

69. That by virtue of Plaintiff Brittany McComb's status as class valedictorian, and the policies and customs of Foothill High School, Clark County School District, the school system created a limited forum in which she and the other Valedictorians were entitled to speak in their own

words at the June 15, 2006, Foothill High School graduation ceremony, and their speeches constituted expression protected by the First Amendment to the United States Constitution and Article I, Section 9 of the Nevada Constitution.

70. That Plaintiff Brittany McComb's speech was private speech entitled to full protection under Clark County School District Regulation 6113.2(IV) and the First Amendment to the United States Constitution and Article I, Section 9 of the Nevada Constitution.

71. That the Defendants, acting individually and/or jointly, deprived the Plaintiff Brittany McComb of her right to free speech and expression under the First Amendment when the Defendants censored her speech and ordered that she not give portions of the speech "Filling that Void" that she had written.

72. That the Defendants, acting individually and/or jointly, deprived the Plaintiff Brittany McComb of her right to free speech and expression under the First Amendment, and Article I, Section 9 of the Nevada Constitution, when the Defendants ordered and/or caused the stage microphone at the June 15, 2006 Foothill High School graduation ceremony to be cut off while the said Plaintiff was addressing the audience at the ceremony.

72A. That the Defendants, acting individually and/or jointly, in making the decision to censor Brittany McComb, made standardless and arbitrary judgments between and among speech with

religious content, and between and among religious speech and political, social, philosophical and economic speech without justification in law, thereby depriving Plaintiffs of their right to free speech and expression under the First Amendment, and Article I, Section 9 of the Nevada Constitution.

73. That the Defendants' actions as set forth herein constituted impermissible religious viewpoint discrimination and deprived the Plaintiff Brittany McComb of her right to free speech and expression under the First Amendment, as the same is applied to the states pursuant to the Fourteenth Amendment, and Article I, Section 9 of the Nevada Constitution.

74. That the Defendants' actions in censoring and suppressing the expression and speech of the Plaintiff Brittany McComb were not reasonable in light of the limited forum created by Clark County School District Regulation 6113.2(IV) and the purposes of the graduation ceremony and were contrary to that and other Clark County School District Regulations.

75. That the Defendants' actions in censoring and suppressing the expression and speech of the Plaintiff Brittany McComb deprived Plaintiffs Constance J. McComb and Marianna McComb and other students at Foothill High School of the right to hear Brittany McComb's valedictory speech at the 2006 Foothill High School graduation ceremony.

76. That upon information and belief, Defendants will not permit other students similarly qualified and situated as Plaintiff Brittany McComb

to present a valedictory speech at future Foothill High School graduation ceremonies containing reference to a particular religion, a deity or other similar purportedly offensive combinations of words referring to religion and, by such actions, will otherwise deprive Plaintiffs Constance J. McComb and Marianna McComb and/or students similarly situated as Brittany McComb of their right to present, and/or to hear, such speech.

77. That the actions of the Defendants violate the Plaintiffs rights under the First Amendment and Article I, Section 9 of the Nevada Constitution, and the Plaintiffs are entitled to relief under 42 U.S.C. § 1983 for the deprivation of their rights caused by the Defendants acting under color of state law.

Second Cause of Action
Establishment Clause

78. The Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-77 above as though set forth *in haec verba*.

79. That in all respects relevant to the matters set forth in this Complaint, the Defendants acted under color of the law of the State of Nevada.

80. That in censoring the speech "Filling that Void," by circling and crossing out portions thereof, and separately annotating the speech with judgments such as "IDENTIFIES A PARTICULAR RELIGION," "DEITIES," and "PROSELYTIZING," the Defendants attempted to make standardless

judgments about religion that the Defendants are not competent or qualified to make and that otherwise constitute impermissible hostility toward Plaintiff Brittany McComb's religion and religious speech and impermissible entanglement of government with religion, and otherwise resulted in Plaintiffs Constance J. McComb and Marianna McComb being unable to hear Brittany McComb's speech and otherwise impermissibly chilled and skewed the speech during the 2006 Foothills High School graduation program, actions that are not only inconsistent with Clark County School District Regulation 6113.2(IV) and other Clark County School District Regulations, but in violation of the Establishment Clause of the First Amendment to the United States Constitution as the same is applied to the states pursuant to the Fourteenth Amendment, thereby depriving Plaintiffs of their right to be free from the discriminatory and arbitrary effects of judgments reflecting an unlawful official establishment of religion.

81. That the Defendants' actions in censoring and preventing the Plaintiff Brittany McComb from giving her speech or additional remarks at the Foothill High School graduation ceremony on June 15, 2006, and in depriving Plaintiffs Constance J. McComb and Marianna McComb of their right to hear Brittany's speech free of discrimination, demonstrated a hostility to and bias against religion in violation of the Establishment Clause of the First Amendment to the United States Constitution, as the same is applied to the states pursuant to the Fourteenth Amendment.

82. That upon information and belief, Defendants will as a matter of practice and custom censor, interfere with and prevent legitimate free expression by other students similarly qualified and situated as Plaintiff Brittany McComb who present valedictory speeches at future Foothill High School graduation ceremonies when such speeches contain references to a particular religion, a deity or other similar purportedly offensive combinations of words referring to religion and will, as a result, otherwise deprive Plaintiff Constance J. McComb and Plaintiff Marianna McComb and/or students similarly situated as Brittany McComb of their right to present, and/or to hear, such speech, as the case may be.

83. That the actions of the Defendants against the Plaintiff Brittany McComb deprived her, and Plaintiffs Constance J. McComb and Marianna McComb, of rights under the Establishment Clause of the First Amendment to the United States Constitution, and threaten such rights of Plaintiffs in the future, for which they are entitled to relief under 42 U.S.C. § 1983.

Third Cause of Action
Free Exercise Clause

84. The Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-83 above as though set forth *in haec verba*.

85. That in all respects relevant to the matters set forth in this Complaint, the Defendants acted under color of the law of the State of Nevada.

86. That by virtue of her status as class valedictorian, and the policies and customs of Foothill High School, Clark County School District, the Defendants granted Plaintiff Brittany McComb the benefit and position of speaking in her own words at the June 15, 2006, Foothill High School graduation ceremony.

87. That the Defendants, acting individually and/or jointly, violated the Plaintiff Brittany McComb's rights of conscience and free exercise of religion under the First Amendment when the Defendants censored her speech for its allegedly offensive words, and threatened, pressured and coerced her to change her speech and attempted to compel her to give a speech deemed acceptable to their perception of religious orthodoxy, all in violation of her rights of conscience guaranteed by the Free Exercise Clause of the First Amendment to the United States Constitution and Article I, Section 4 of the Nevada Constitution.

88. That the Defendants, acting individually and/or jointly, violated the Plaintiff Brittany McComb's Free Exercise of religion under the First Amendment to the United States Constitution, and Article I, Section 4 of the Nevada Constitution, when the Defendants subjected her expression of religious conscience to public ridicule and humiliation by unnecessarily censoring her speech and preventing her from giving her speech or additional remarks at the Foothill High School graduation ceremony on June 15, 2006. The Defendants' actions as set forth herein violated Plaintiff Brittany McComb's rights of conscience protected under the Free Exercise Clause of the First

Amendment to the United States Constitution, as the same is applied to the states pursuant to the Fourteenth Amendment thereof, and Article I, Section 4 of the Nevada Constitution.

89. That upon information and belief, Defendants will as a matter of practice and custom censor, coerce and interfere with the legitimate right of conscience under the Free Exercise Clause of other students similarly qualified and situated as Plaintiff Brittany McComb who present valedictory speeches at future Foothill High School graduation ceremonies when such speeches contain references to a particular religion, a deity or other similar purportedly offensive combinations of words referring to religion, and may be expected to likewise deprive Plaintiff Marianna McComb and/or students similarly situated as Brittany McComb of their rights of conscience under the First Amendment and Article I, Section 4 of the Nevada Constitution.

90. That the actions of the Defendants violate the Plaintiffs' rights under the First Amendment and Article I, Section 4 of the Nevada Constitution, and the Plaintiffs are entitled to relief under 42 U.S.C. § 1983 for the deprivation of their rights caused by the Defendants acting under color of state law.

Fourth Cause of Action
Equal Protection of the Law

91. The Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-90 above as though set forth *in haec verba*.

92. That in all respects relevant to the matters set forth in this Complaint, the Defendants acted under color of the law of the State of Nevada.

93. That Plaintiff Brittany McComb, by virtue of her status as class valedictorian and the policies and customs of Foothill High School, was qualified and entitled to give an address at the June 15, 2006 graduation ceremony for Foothill High School, and her address constituted expression protected by the First Amendment to the United States Constitution.

94. That the Defendants' actions censoring and preventing the Plaintiff Brittany McComb from giving the speech "Filling that Void" or additional remarks at the Foothill High School graduation ceremony on June 15, 2006, while permitting others to speak at the ceremony without censorship or inhibition, constituted intentional, invidious discrimination against the Plaintiff Brittany McComb because of her exercise of First Amendment rights and deprived the Plaintiff of Equal Protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution.

95. That the Defendants' actions censoring and preventing the Plaintiff Brittany McComb from giving the speech "Filling that Void" or additional remarks at the Foothill High School graduation ceremony were not reasonable in light of Clark County School District Regulation 6113.2(IV) and the purposes of the graduation ceremony and were contrary to that and other Clark County School District Regulations that permit unrestrained equal access for speech with political, artistic or other

content favored by the Defendants and the school system, and, as applied by the Defendants to Plaintiff Brittany McComb, resulted in arbitrary, capricious, and irrational content discrimination among different forms of social, economic, philosophical, political and religious speech that deprived the Plaintiff Brittany McComb of equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution.

96. That upon information and belief, Defendants will as a matter of practice and custom censor, interfere with and discriminate between and among the free expression of other students similarly qualified and situated as Plaintiff who present valedictory speeches at future Foothill High School graduation ceremonies when such speeches contain references to a particular religion, a deity or other similar purportedly offensive combinations of words referring to religion, and may be expected to likewise deprive Plaintiff Constance J. McComb and Plaintiff Marianna McComb and/or students similarly situated as Brittany McComb of their right to give, and/or to hear, such speeches, as the case may be and thereby deprive them of Equal Protection of the law pursuant to the Fourteenth Amendment.

97. That the Plaintiffs are entitled to relief under 42 U.S.C. § 1983 for the deprivation of her right to equal protection of the law caused by the Defendants acting under color of state law.

Fifth Cause of Action
Title II, Civil Rights Act of 1964 - 42 U.S.C. sec. 2000a et seq.

98. The Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-97 above as though set forth *in haec verba*.

99. That in all respects relevant to the matters set forth in this Complaint, the Defendants acted under color of the law of the State of Nevada.

100. That Plaintiffs are persons as defined under Title II of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000a et seq. ("Title II").

101. That the 2006 Foothill High School graduation ceremony was held at the Orleans Arena, a 9,000 seat arena which is part of the privately-owned, 1886-room Orleans Hotel & Casino located at 4500 West Tropicana Boulevard, Las Vegas, Nevada (the "Arena").

102. That the Arena is a place of public accommodation under section 2000a(b)(3) of Title II, specifically a "theater, concert hall, sports arena, stadium or other place of exhibition or entertainment," within the meaning of Title II where concerts, athletic events, convocations, entertainment events and other events are routinely held.

103. That upon information and belief the Clark County School District rented the Arena from

its owner to hold the Foothill High School graduation ceremony on June 16, 2006.

104. That upon information and belief, the Defendants were in charge of all or part of the program and/or facilities at the Arena during the graduation.

105. That the Arena and its operations affect commerce under Title II.

106. That arenas similar to the Arena have been found by the courts to be places of public accommodation under Title II.

107. That in such places of public accommodation all persons are entitled under Title II sec. 2000a(a) "to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of [that] place of public accommodation ... without discrimination or segregation on the ground of ... religion."

108. That section 2000a(a) has been broadly construed by the courts to include the right to attend events held in places of public accommodation without discrimination on the basis of religion.

109. That moreover, section 2000a-2 of Title II provides that no person shall either (a) deprive or attempt to deprive any person of any right under section 2000a, (b) threaten or coerce any person with the purpose of interfering with a section 2000a right, or (c) punish or attempt to punish any person for exercising or attempting to exercise a section 2000a right.

110. That the Defendants' actions in censoring and preventing the Plaintiff Brittany McComb from giving the speech "Filling that Void" or additional remarks at the Foothill High School graduation ceremony on June 15, 2006, while permitting others equally qualified and situated to speak at the ceremony without censorship or inhibition, constituted intentional, invidious discrimination against the Plaintiff Brittany McComb on account of religion in violation of Title II.

111. That the actions of the Defendants alleged herein were deliberately, intentionally, willfully, purposefully and knowingly done in violation of federally-protected rights and because of Plaintiffs' religion.

112. That Defendants either knew or showed a negligent or reckless disregard for the matter of whether their conduct violated federal rights.

113. That Plaintiffs' religion makes a difference in all actions adverse to them and was and is a determinative, motivating or substantial factor in all actions adverse to them, though not necessarily the sole factor.

114. That Plaintiff Marianna McComb and students similarly situated are threatened with irreparable injury under 42 U.S.C. sec. 2000a-3(a) which authorizes permanent or temporary injunctive relief or a restraining order on a showing that a defendant under Title II is "about to engage in any act or practice prohibited by section 2000a-2 of [that] title."

115. That the conduct of the Defendants and those acting in concert with them violate rights protected by Title II, sections 2000a(a) and 2000a-2(a), (b) and (c).

116. That the Plaintiff Brittany McComb gave the notice required by 42 U.S.C. sec. 2000a-3(c) to the Nevada Equal Rights Commission on November 9, 2006, and that thirty (30) days have passed since the notice was given.

WHEREFORE, Plaintiffs pray for judgment against the Defendants, jointly and severally, as follows:

(1) that judgment be entered finding and concluding that the Defendants deprived the Plaintiffs of their rights under the First and Fourteenth Amendments to the United States Constitution;

(2) that a declaratory judgment be entered declaring that the Defendants' practice and custom of censoring religious speech be declared a violation of Plaintiffs' statutory rights under Title II, sections 2000a(a) and 2000a-2(a), (b) and (c), and also the statutory rights of others who are similarly situated;

(3) that this Honorable Court enjoin the Defendants from censoring and/or interfering on the basis of religious content with future graduation speeches at Foothill High School in a manner that would violate the rights to Free Speech, Free Exercise of Religion, the Establishment Clause and/or the

Equal Protection Clause of students and parents at Foothill High School, including without limitation, Plaintiffs Constance J. McComb and Marianna McComb;

(4) that this Court award Plaintiffs compensatory damages in an amount to be determined at trial;

(5) that this Court order Defendants to pay Plaintiffs' attorney's fees pursuant to 42 U.S.C. § 1988 and 42 U.S.C. § 2000a-3(b), together with costs of this litigation; and,

(6) that this Court grant such other and further relief as the Court may deem just and proper in the premises.

DATED this 21st day of December, 2006.

DOUGLAS H. CLARK, P.C.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 21, 2006, in accordance with Fed. R. Civ. P. 5, a copy of the foregoing First Amended Complaint was served on the parties by CMECF/E-MAIL:

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Exhibit "1"

May 10 06 07:33a

Filling that Void
By: Britnny McComb

Do you remember those blocks? The ones you would fit into cut-outs to learn all the different shapes? The ones you used to play with before kindergarten, during the good old, no grades, no pressure preschool days? I find it funny how easily amused we are as children. Many of us would have sat on the story rug for hours with those blocks trying to fit the circle into the square cut-out if it wasn't for the aid of a teacher.

As one of the valedictorians for our senior class you would think I caught on to which blocks fit into which cut-outs quickly. But, to be upfront, it took me awhile. Up until my freshman year in high school I was still attempting to fill certain voids with shapes that were often peculiar and always too small.

The main shape I have wrestled with over the years is my accomplishments. They began to define my self-worth at a young age. Swimming competitively was one of those achievement blocks. If I took third in a competition rather than first, I felt I hadn't met the mark, that I had failed. But strangely enough if I took first I would belittle my success and even first place left me feeling empty and unfulfilled. Either way the shape entitled "accomplishments" was too small to fill the void constantly reminding me there was something more, something more than me and what I made of my life, something more than my friends and what they made of their own lives.

The summer after my freshman year I quit swimming. I quit trying to fill the huge void in my soul with the meager accomplishments I managed to obtain in swimming. After quitting this amazing sense of peace came over me and I realized after fifteen years of sitting on the story time rug there was a teacher there trying to help me. God. I had ignored Him all these years and He was just trying to show me what shape fits into the cut-out in my soul.

This hole couldn't be filled with swimming, with friends, with family, with dating, with partying, with drinking, with anything but God. His love is "that something more" we all desire. It's unprejudiced, it's merciful, it's free, it's real, it's huge and it's everlasting. God's love is so great that he gave His only Son up to an excruciating death on a cross so His blood would cover all our shortcomings and our relationship with Him would be restored. And he gives us a choice- to live for ourselves or to live for something greater than ourselves- eternity and His love.

IDENTIFIES A PARTICULAR RELIGION

May 10 06 07:39a

Ditto

That's why Christ died. John 10.10 says He died so we no longer have to watch our full share, but so we can have life "and life to the fullest." I now desire not my own will but the will of God for my life- however crazy and extravagant, or seemingly mundane and uneventful that might be. Strangely enough, surrendering my own will for the will of God, giving up control, gave me peace, gave me a calm I can't even begin to express with words.

Four years ago becoming valedictorian would have been just another attempt to fit the circle into the square cut-out, but because my heart is so full of God's love the honor of speaking today is just that- an honor. Without it I would feel just as full and purposeful as I do at this moment. And I can guarantee 100%, no doubt in my mind, that if you choose to fill yourself with God's love rather than the things society tells us will gratify us, you will find success, you will find yourself a goal. You will thrive whether you attend a prestigious university next fall and become a surgeon, career man or woman or begin a life long marriage position as Michaela's tomorrow. Because the fact is even he, an innate desire to be apart of something greater than himself, that something is God's plan. And God's plan for each of our lives may not leave us with an impressive and extensive resume, but I know one can't go plan. He promises to His us. Jeremiah 29:11 says, " For I know the plans I have for you," declares the Lord, "plans to prosper you and not to harm you, plans to give you a hope and a future." I trust Him, and so can you.

PROSECUTION

BEST AVAILABLE COPY

Exhibit "2"

Brittany McComb
Foothill High School Graduation
June 15, 2006
Video Clip
retrieve from:

http://www.rutherford.org/movieclips/mccomb_LRG.mov

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Civil Action No.: 06-852

BRITTANY McCOMB, et al.,

Plaintiffs,

vs.

GRETCHEN CREHAN, et al.,

Defendants.

ORDER

This matter having come on for hearing before this Honorable Court on the 18"' day of December, 2006 at 10:09 a.m. on Defendants' Motion to Dismiss, and after considering the briefing of the parties, the parties' respective arguments at the hearing, and for good cause shown, it is hereby ordered that the said Defendants' Motion to Dismiss shall be DENIED.

DATED this 22nd day of December, 2006.

IT IS SO ORDERED

/s/

U.S. DISTRICT JUDGE
DATED: JANUARY 5, 2007.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

2106-CV-0852-RCJ-PAL

BRITTANY McCOMB, et al.,

Plaintiffs,

vs.

GRETCHAN CREHAN, et al.,

Defendants.

ORDER

This matter comes before the Court on Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (#36). On June 15,2006, Plaintiff Brittany McComb had her valedictory graduation speech cut short by Clark County School District because she attempted to include religious language. Joined by her younger sister Mariana McComb, who was present at the graduation ceremony, Brittany subsequently filed a Complaint with this Court on July 13, 2006, alleging violation of her First and Fourteenth Amendment rights. Defendants moved to dismiss the case, arguing that Ninth Circuit case law sanctioned their attempts to avoid an Establishment Clause Violation. (#12.) Following a lengthy hearing on December 18, 2006,

this Court denied Defendants' Motion to Dismiss on January 9,2007 (#33). Plaintiffs thereafter filed their First Amended Complaint (#30). The Amended Complaint named Superintendent Walt Ruffles as an additional Defendant and clarified Plaintiffs' factual allegations. However, the Amended Complaint did not add additional causes of action or new allegations. Defendants nevertheless filed a second Motion to Dismiss the Amended Complaint (#36). Defendants' present Motion is virtually identical to the initial Motion to Dismiss. It raises arguments that have already been briefed, discussed at oral argument, and ultimately rejected by the Court. Discovery is ongoing.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss Plaintiffs Amended Complaint (#36) is *denied.*

DATED: June 18,2007

/s/

ROBERT C. JONES
UNITED STATES DISTRICT JUDGE

(2)

No. 08-1566

Supreme Court, U.S.
FILED
OCT 8 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BRITTANY McCOMB and MARIANNA McCOMB, by her best friend, CONSTANCE J. McCOMB,

Petitioners,

v.

GRETCHEN CREHAN, ROY THOMPSON, and CHRISTOPHER SEFCHECK, individually and in their official capacities as employees of Foothill High School, and the Clark County School District, a political subdivision of the State of Nevada, and WALT RULFFES, in his official capacity as Superintendent of the Clark County School District, a political subdivision of the State of Nevada, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether public school officials can properly prevent a student speaker from engaging in proselytizing speech at a public high school sponsored and controlled graduation ceremony in order to avoid violation of the Establishment Clause of the First Amendment.

II. Whether the school officials met the jurisdictional requirement of Rule 4 of the Federal Rules of Appellate Procedure when they filed their interlocutory appeal with the Ninth Circuit Court of Appeals within 30 days of the United States District Court's denial of their motion to dismiss the amended complaint.

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INTRODUCTION

On at least two recent occasions, this Court has denied petitions for certiorari based on circumstances that were remarkably similar to this case. *Lassonde v. Pleasanton Unified Sch. Dist.*, 540 U.S. 817 (2003); *Niemeyer*[1] *v. Oroville Union High Sch. Dist.*, 532 U.S. 905 (2001).[2] The same result is warranted here.

Petitioners have failed to present any "compelling reasons" for their Petition for a Writ of Certiorari ("Petition") to be granted. *See* Sup. Ct. R. 10. Petitioners fail to demonstrate that the Ninth Circuit's March 20, 2009, unpublished Memorandum Opinion ("Ninth Circuit Opinion") is in conflict with a decision of this Court or another Court of Appeals, or that the Ninth Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). In addition, the Ninth Circuit's Opinion lacks precedential value and is not worthy of review by this Court. Therefore, the Petition should be denied.

---

1. This was an appeal of *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000). The case involved two students: Ferrin Cole (who gave a sectarian invocation) and Chris Niemeyer (who gave a proselytizing valedictory speech). When appealed to the Supreme Court only Niemeyer was a party. For consistency, the case will be commonly referred to as "*Cole*" in this brief.

2. The Rutherford Institute, who has attorneys participating as co-counsel for Petitioners in this case, should be very familiar with *Cole* and *Lassonde* as it was involved in those actions as well.

STATEMENT OF THE CASE

A. Nature Of The Case

Petitioner Brittany McComb ("McComb") was a valedictorian speaker at a public high school sponsored and controlled graduation ceremony. Her speech was edited because it contained proselytizing content that, if allowed to be delivered, would have violated the Establishment Clause of the First Amendment. Ms. McComb's sister, Marianna McComb, then a student at Foothill High School, through her mother, Constance McComb, is also a party to this action. Petitioners filed this action claiming that the actions of Principal Gretchen Crehan, Assistant Principal Roy Thompson, district employee Christopher Sefcheck, and Superintendent Walt Rulffes (the "School Officials") violated their First and Fourteenth Amendment rights.

B. Parties To The Proceeding

The School Officials would like to point out that the Clark County School District ("the school district") is not a named party. This is not clear by the manner in which Petitioners have phrased the caption of the Petition and the parties to the proceeding section. In the proceedings below, the school district was listed merely as an employer of Respondents Crehan, Thompson, and Sefcheck. *See e.g.*, Petitioners' Appendices 17 (hereinafter "Pet. App.").

C. Counter Statement Of Facts

An accurate statement of the facts appears below.

1. The School Officials Had Plenary Control Over The Public School Sponsored Graduation Ceremony And The Content And Delivery Of McComb's Speech

The School Officials, including Principal Crehan and Assistant Principal Thompson, in their official capacities, were in charge of the planning and execution of all aspects of the Foothill High School ("Foothill") graduation ceremonies of June 15, 2006. Am. Compl. ¶¶ 25-27 (Pet. App. 29).

McComb was selected to be one of three class valedictorians solely on the basis of her grade point average. Am. Compl. ¶¶ 15-17 (Pet. App. 24). All valedictorian speakers, including McComb, were required to submit their graduation speeches to Assistant Principal Thompson for review in advance of the graduation ceremony. Am. Compl. ¶¶ 34-35 (Pet. App. 30-31). The School Officials retained primary and final authority over the content of McComb's graduation speech and did, in fact, exercise this control by asking McComb to change the content of her speech as originally submitted. Am. Compl. ¶¶ 35-43 (Pet. App. 30-32).

The school sponsored graduation ceremony was held at the Orleans Arena in Las Vegas, Nevada. The facility was rented and insured by the school district for the high school graduation ceremony. As acknowledged in

the Amended Complaint, "[Respondents] were in charge of all or part of the program and/or facilities at the Arena during the graduation." Am. Compl. ¶¶ 103-104 (Pet. App. 51-52). Additionally, McComb's speech was broadcast over a microphone and amplification system that was controlled by school officials acting in their official capacities. Am. Compl. ¶¶ 7, 57, 59 (Pet. App. 21, 35).

Control over the graduation ceremony and content of the student speeches is also evident from the regulations and guidelines established by the school district. Petitioners repeatedly mischaracterize Clark County School District Regulation 6113.2.

Regulation 6113.2 did not require the School Officials to permit McComb to address the crowd in her own words as suggested by Petitioners. First, the reference to unrestricted speech in Regulation 6113.2(IV) is clearly *conditioned* upon the student *actually retaining* "primary control over the content of their expression."[3] (Pet. App. 3-4). McComb did *not* have primary control over the content of her speech. Second, the neutral disclaimer language of Regulation 6113.2(IV) is inapplicable by its own terms because McComb's speech was plainly attributable to the school based on the school's control over the graduation

3. CCSD Regulation 6113.2(IV) provides, in relevant part, with emphasis added: "Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and *retain primary control over the content of their expression*, however, that expression is not attributable to the school and, therefore, may not be restricted because of its religious (or anti-religious) content."

ceremony and the content of the speech. Third, McComb's speech did not fall within the purview of Regulation 6113.2(III) because it was not "[s]tudent initiated *non-school sponsored* religious speech."[4] (Pet. App. 3) (emphasis added).

Additional evidence of control can be seen in an April 21, 2003, guidance memorandum distributed by the school district's General Counsel (at the Superintendent's direction) to the district's Executive Cabinet. The guidance provided:

> Commencement exercises, as well as student assemblies and similar activities, are clearly *school sponsored activities.* The Superintendent has directed that prior to such activities, student speeches shall be reviewed for content. When an administrator reviews student speech, she will *substantially control*

4. Petitioners also rely upon the federal guidance issued by the Secretary of Education under the Elementary and Secondary Education Act of 1965 (as amended by the No Child Left Behind Act of 2001), in an attempt to establish that McComb retained primary control over her speech. The federal guidance is inapposite in this case. The guidance document itself recognizes that where school officials do in fact "substantially control" the content of what is expressed, which occurred in this case, the speech is attributable to the school and may not include prayer or other specifically religious (or anti-religious) content. The federal guidance also does not prohibit regulation of proselytizing speech. *See* Dep't of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools* (Feb. 7, 2003) (http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html) (last visited Sept. 17, 2009).

> *the speech* by ensuring that it *does not* contain speech which interferes with the educational process, is lewd, profane, threatening, *proselytizing* or constitutes prayer. A *neutral disclaimer does not absolve* the administrator of the responsibility to review and monitor the speech.

See Am. Compl. ¶¶ 64D-64F (Pet. App. 39-40); Ninth Circuit ER 98[5] (emphasis added).

Finally, Petitioners have misinterpreted the school's instructions regarding commencement speeches. (Pet. App. 5). The document contains various instructions and limitations on the content as well as presentation of the valedictorian speeches, which is further evidence of the administration's plenary control over the graduation ceremony and the speeches. *Id.*

2. The Unedited Version Of McComb's Speech Contained Proselytizing Comments

After reviewing McComb's draft speech, Principal Crehan and Assistant Principal Thompson, acting on the advice of legal counsel of the school district, advised McComb that she must remove the proselytizing remarks from her graduation speech.[6] Am. Compl. ¶¶ 35-43 (Pet. App. 30-32).

---

5. Although this memorandum was argued at the lower court levels, and referenced by Petitioners in the Amended Complaint, it is noticeably absent from Petitioners' Appendices.

6. Despite numerous attempts to clarify this point with Petitioners, the Respondents again reiterate that the handwritten comment is "ditto" and not "deity." (Pet. App. 7, 59).

Not surprisingly, the instant Petition does not include the full text of McComb's unedited speech. A reading of the actual text of the speech reveals that the language was indeed proselytizing. It also reveals that McComb *did not* write primarily in the first person as argued by Petitioners. Specifically, the School Officials required removal of the following proselytizing remarks in McComb's speech:

> God's love is so great that he gave *His only son up to an excruciating death on a cross so His blood would cover all our shortcomings and our relationship with Him could be restored.* And he gave *us* a choice to live for *ourselves* or to live for something greater than *ourselves* - eternity and His Love.
>
> That is why Christ died. John 10:10 says He died so *we* no longer have to reach and fall short, so *we* can have life "and life to the fullest".
>
> * * * *
>
> And I can guarantee, 100%, no doubt in my mind, that if *you* choose to fill *yourself* with God's love rather than the things society tells *us* will satisfy *us*, *you* will find success, *you* will find *your* self worth. *You* will thrive whether *you* attend a prestigious university next fall and become a successful career man or woman or begin a life long manager position at McDonald's tomorrow. Because the fact is *man* has an innate desire to be a part of something greater than himself. That

> something is God's plan. And God's plan for each of *our* lives may not leave *us* with an impressive and extensive resume, but if *we* pursue His plan, He promises to fill *us*. Jeremiah 29:11 says, "'For I know the plans I have for *you*,' declares the Lord, 'plans to prosper *you* and not to harm *you*, plans to give *you* a hope and a future.'" Trust me, this block fits.

(Pet. App. 6-7, 58-59) (emphasis added).

McComb was allowed to give the majority of her speech at the graduation ceremony on June 15, 2006. She was allowed to include, and *did in fact deliver*, numerous statements about her *own personal religious beliefs*, including several references to God and His affect on her own life. (Pet. App. 6, 58, 61); *see* http://www.youtube.com/watch?v=kqzfIitfHjU (last visited Sept. 14, 2009). The School Officials *only* objected to the specific content that included proselytizing remarks that would have run afoul of the Establishment Clause.

3. McComb Did Not Honor Her Commitment To Give The Version Of The Speech She Agreed To Give

After Crehan and Thompson advised McComb that she must remove the proselytizing remarks from her graduation speech, she agreed that she would give the speech without those passages. Am. Compl. ¶ 54 (Pet. App. 34). Immediately prior to the graduation ceremony, district employee Christopher Sefcheck (who was in control of the microphone and amplification system at

the graduation ceremony) advised McComb, as well as the two other valedictorian speakers, that he had been instructed to turn off their microphone if any of them deviated from the approved speeches that had been submitted to Crehan and Thompson. Am. Compl. ¶ 59 (Pet. App. 35).

In blatant disregard of her express assurances to the contrary, upon assuming the podium at the ceremony, McComb began to give the unredacted version of her speech — the version that included the proselytizing remarks that sought to persuade and recruit the audience to accept her particular religious beliefs. Am. Compl. ¶¶ 61-62 (Pet. App. 36). The microphone was turned off by Sefcheck during her speech only when she deviated from the approved script and was half way through the sentence which included the following proselytizing language: "God's love is so great that he gave His only son up to an excruciating death on a cross so His blood would cover all our shortcomings and our relationship with Him could be restored." Am. Compl. ¶62 (Pet. App. 36); (Pet. App. 6, 58, 61); http://www.youtube.com/watch?v=kqzfIitfHjU (last visited Sept. 14, 2009).

4. No Other Speech At The Foothill Graduation Ceremony Included Proselytizing Language

No other speech was edited at the graduation ceremony, because no other speech contained proselytizing language. The Petition focuses heavily on a comparison of the speeches given by co-valedictorians Brittany McComb and Janelle Oehler. However, as recognized by Chief Judge Alexander Kozinski at the

oral argument before the Ninth Circuit Court of Appeals, the language of Oehler's speech is, in fact, "*quite different*" than McComb's speech and contains *no proselytizing language*. *See* Audio: Oral Argument before the Ninth Circuit in McComb v. Crehan, 07-16194 (March 10, 2009), located at http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002983; *see also* Am. Compl. ¶ 64C (Pet. App. 38-39).

Oehler spoke of finding a person's *own inspiration* through an analogy to a traditional family spaghetti dinner. Oehler made only *personal first person references* to her *own faith*, and suggested that the audience find their *own inspiration*. Am. Compl. ¶ 64C (Pet. App. 38-39); (*see also* Pet. App. 8, 61). Oehler did not engage in proselytizing:

> And of course our meal is never started without prayer. *My* Heavenly Father plays an extremely important role in *my* life. *I* am confident that *I* would not be standing before you today if *I* had not included Him in *my* life. He is the One who truly understands our individual needs. He is always there to listen, to lead, to guide and to give *me* strength *I* need to keep, when *I* need, and to give *me* the strength that *I* need to keep on going when *I* no longer believe *I* can. *I* would be nothing without Him. *Find your inspiration.* Living with the hope for a brighter future will make a significant difference in our lives, provide us with true inner happiness and personal success. If we strive to be more motivated by inspiration, we will find ourselves

> more satisfied, as if we had enjoyed a complete balanced and nutritional spaghetti dinner.

Am. Compl. ¶ 64C (Pet. App. 38-39) (emphasis added); (Pet. App. 8, 61). Because Oehler's speech contained no proselytizing language, there was no need for the School Officials to edit her speech. The same cannot be said for McComb's speech.

D. Procedural History

Respondents would like to clarify the procedural history with regard to the issue of the timeliness of the interlocutory appeal. To prevent repetition, Respondents will discuss these issues in Section E.1. below.

REASONS FOR DENYING THE PETITION

A. The Ninth Circuit Memorandum Opinion Lacks Precedential Value And Is Therefore Not Certworthy

The Ninth Circuit Memorandum Opinion in this case has little precedential value, and thus lacks sufficient importance to merit review by this Court. First, the decision is unpublished. *See* Ninth Circuit Opinion (Pet. App. 2) ("This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.").

Second, the Ninth Circuit's unpublished opinion does not establish, alter, modify, or clarify a rule of law. It contains no unique factual findings or extensive legal analysis that may be applied by courts in future cases. With regard to the First Amendment issues, it simply cites to

the Ninth Circuit cases of *Cole v. Oroville High School District*, 228 F.3d 1092 (9th Cir. 2000), and *Lassonde v. Pleasanton Unified School District*, 320 F.3d 979 (9th Cir. 2003) which are virtually identical to the instant case. *See* Ninth Circuit Opinion (Pet. App. 2). Therefore, the Ninth Circuit Opinion has little precedential value and is not worthy of review by this Court.

Similarly, the June 18, 2007, Order of the United States District Court for the District of Nevada denying Respondents' motion to dismiss the amended complaint (that was the subject of the appeal to the Ninth Circuit) was only two pages in length and was unpublished. It contains no factual discussion or legal analysis on the issues raised in this Petition. *See* June 18, 2007 Order (Pet. App. 65-66).

The Petition is nothing more than a veiled attempt by Petitioners to have this Court re-examine the Ninth Circuit's prior decisions in *Cole* and *Lassonde*.[7] The Petition is not certworthy, and should be denied.

B. The Ninth Circuit Decision In This Matter Does Not Create A "Split" Among The Circuits On The First Or Fourteenth Amendment Issues That Requires Reconciliation By This Court

Petitioners argue that the decisions of the Eleventh Circuit in *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001), and that of the Eighth Circuit in *Doe ex rel. Doe v. School District of Norfolk*, 340 F.3d

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7. *Lassonde v. Pleasanton Unified Sch. Dist.*, 540 U.S. 817 (2003) (writ of certiorari denied); *Niemeyer v. Oroville Union High Sch. Dist.*, 532 U.S. 905 (2001) (writ of certiorari denied).

605 (8th Cir. 2003), are directly at odds with the Ninth Circuit Opinion in this case. The purported "split" or "confusion" among the Circuits is nothing more than an illusion created by the Petitioners. The Circuit decisions consistently apply the *same legal principles* and are distinguishable based upon the facts of the particular school district policy at issue. Thus, certiorari is not required to bring about uniformity of decisions among the Circuits.

In *Adler v. Duval County School Board*, 250 F.3d 1330, 1331 (11th Cir. 2001), the Eleventh Circuit held that the school system's policy of permitting a graduating student, elected by her class, to deliver an *unrestricted message of her choice* at a graduation ceremony was not facially violative of the Establishment Clause. In *Adler*, the school district *chose to relinquish editorial control* over the graduation speeches. The policy in *Adler* did not contain any restriction on the selection of the student speaker or on the content of the message, and indeed *expressly forbid* involvement of school officials in the particular graduation message. *Id.* at 1136-37. The school policy provided, in part, that "[t]he purpose of these guidelines is to allow students to *direct their own* graduation message *without monitoring or review by school officials.*" *Id.* at 1337 (emphasis added).

The policy at issue in *Adler* is significantly different factually than the Clark County School District policy at issue here, in which the school established the criteria for selecting the speaker and regulated the content of the speech. As noted by the court in *Adler*, "The ability to regulate the content of speech is a hallmark of state

involvement, and the Supreme Court returned repeatedly to that theme in *Santa Fe*." *Adler*, 250 F.3d at 1337. "What turns private speech into state speech in this context is, above all, the additional element of state control over the content of the message." *Id.* at 1341.

Thus, the legal analysis of the Eleventh Circuit in *Adler* proceeded under the *very same legal framework* as the Ninth Circuit's decision, it just reached a different result based upon the factual difference of lack of state-control over the graduation ceremony and student speeches. For example, in this case, unlike *Adler*: (1) McComb was selected and authorized by Foothill's administration to make a valedictory graduation speech; (2) the graduation ceremony was held at the Orleans Arena, which was rented and paid for by the school district; (3) only students selected by Foothill's administration were allowed to speak at the graduation; (4) school officials retained plenary control over all aspects of the graduation ceremony and had final authority to approve the content of McComb's speech; (5) Foothill administration, and the school district's legal counsel, reviewed and edited McComb's speech; (6) the speech was broadcast by a district employee over a microphone and amplification system controlled by Foothill; and (7) the school had a policy of turning off the microphone if the student speech deviated from the approved script. Plainly, the outcome in this case versus the outcome in *Adler* can be explained based upon factual variations rather than conflicting legal theories.

There is also no conflict between the Ninth Circuit's Opinion and the Eighth Circuit decision of *Doe ex rel. Doe v. School District of City of Norfolk*, 340 F.3d 605 (8th Cir. 2003). In *Norfolk*, during a high school graduation ceremony, a school board member was allowed to speak because he had a child in the graduating class. Without the prior knowledge of school district officials, the school board member said a prayer. *Id.* at 608. The Eighth Circuit held that the remarks did not violate the Establishment Clause because the recitation was protected *private speech*. The school had *no control over* and was in *no way involved* in the remarks, and thus there was no threat of participants believing the speech was school endorsement of religion. *Id.* at 612-13.

The Eighth Circuit in *Norfolk* proceeded under the identical legal framework as the Ninth Circuit's decision in this case. The court conducted a detailed analysis of whether the speech constituted "*government* speech endorsing religion, which the Establishment Clause forbids, [or] *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 610. The Eighth Circuit recognized that the degree of school sponsorship and involvement is key. *Id.* at 611. A different result was reached in *Norfolk* based upon the factual differences of a "complete absence of any involvement" by the school district and the "complete autonomy" afforded the speaker in determining the content of his remarks. *Id.* at 612.

In this case, unlike the facts in *Norfolk*, McComb attempted to deliver a proselytizing sermon, the content of which was subject to the primary and ultimate control

of the School Officials. McComb was not given "complete autonomy" over the content of the message as was the speaker in *Norfolk*. *See id.* at 612. Therefore, the different outcomes are easily explained based upon factual variations rather than a genuine split in legal theories.

In summary, the Ninth Circuit's Opinion did not create any "split" or "confusion" among the decisions of the Circuits on this issue. Indeed, Respondents are aware of *no Circuit decision* upholding the right of a student to deliver a proselytizing sermon as part of a school controlled commencement speech at a public high school graduation. There is no reason for the Court to take this matter now.

C. The Ninth Circuit Decision Is Faithful To Supreme Court Precedent

The Ninth Circuit's decision in this matter is wholly consistent with the principles enunciated by this Court in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), and *Lee v. Weisman*, 505 U.S. 577 (1992). The decision also reaffirms the Ninth Circuit's earlier decisions on this very same issue in *Cole v. Oroville High School District*, 228 F.3d 1092 (9th Cir. 2000), and *Lassonde v. Pleasanton Unified School District*, 320 F.3d 979 (9th Cir. 2003).

In *Lee v. Weisman*, this Court held that a school district violated the Establishment Clause when it invited a rabbi to deliver a non-sectarian, non-proselytizing prayer at its graduation ceremony. 505 U.S. at 581, 599. The Court determined that, because the

principal decided that an invocation should be given, chose the rabbi and gave guidelines for the prayer, and the school had a "high degree of control" over the graduation ceremony (including control over the contents and timing of the program, the speeches, the dress code, and the decorum of the students), the prayer "bore the imprint of the State." *Id.* at 587-90, 597. The Court noted that the singular importance of a high school graduation as a once-in-a-lifetime event and the susceptibility of adolescents to peer and social pressure left a dissenting student with the unduly coercive dilemma of participating in the prayer against her conscience or missing her own high school graduation. *See id.* at 592-96, 598. Because dissenting students were given "no real alternative," the Court concluded the school district had in effect "compelled . . . participation in an explicit religious exercise." *Id.* at 598.

Subsequently, in *Santa Fe Independent School District v. Doe*, this Court held that a school district policy, that authorized a student selected by a vote of fellow classmates to deliver a non-sectarian and non-proselytizing "statement or invocation" to "solemnize" varsity football games, violated the Establishment Clause. 530 U.S. at 298 n.6, 317. The Court rejected the argument that the student's prayer was private speech. Not only did the school district authorize the invocation through its own policy and allow the invocation to take place on government property at a government-sponsored, school-related event, it also exercised plenary control over the invocation by placing limitations on its content, allowing only selected students to give the invocation, and broadcasting it over the school's public address system. *See id.* at 302-10. The Court

reasoned that the district's control over and entanglement with the invocation would not only cause an objective observer to perceive that the district endorsed the religious message, but also constituted an "actual endorsement of religion" in public schools. *Id.* at 305-10. Thus, the Court concluded, under the principles articulated in *Lee*, the delivery of the invocation before school football games impermissibly applied social and peer pressure to coerce dissenters to "forfeit" their right to attend the games "'as the price of resisting conformance to state-sponsored religious practice.'" *Id.* at 311-12 (quoting *Lee*, 505 U.S. at 596). The Court further concluded that delivery of the invocation had the "improper effect of coercing those present to participate in an act of religious worship." *Id.* at 312.

Petitioners themselves acknowledge that in *Santa Fe* and *Lee* this Court emphasized "two synergistic factors: the extent of state control and the perceived coercion of students to participate." (Pet. at 21). The Ninth Circuit faithfully employs these same factors. *See* Ninth Circuit Opinion (Pet. App. 2) (citing *Cole* and *Lassonde*); *Cole*, 228 F.3d at 1101-04; *Lassonde*, 320 F.3d at 983-85.

The principles of *Santa Fe* and *Lee* are not limited to "prayer" as suggested by Petitioners. In both cases, this Court repeatedly referenced government sponsorship of religion as well as an impermissible coercion of attendance and participation in a "*religious activity*," "*religious practice*," or "*religious exercise*." *Lee*, 505 U.S. at 586, 587, 588, 589, 592, 593, 594, 596, 597, 598, 599 (this Court repeatedly referenced

"religious activity," "religious practice," and "religious exercise" and did not limit the analysis solely to prayer); *Santa Fe*, 530 U.S. at 302, 307, 308, 309, 312, 313, 317 (same).

Proselytizing, no less than prayer, is a religious practice. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 23 (1989) (stating that proselytizing is a religious activity); *Follett v. McCormick*, 321 U.S. 573, 576-77 (1944) (stating that proselytizing, including preaching and distribution of religious literature, is a religious activity); *Murdock v. Pennsylvania*, 319 U.S. 105, 108-10 (1943) (same); *see also Lassonde*, 320 F.3d at 984 ("'proselytizing, no less than prayer, is a religious practice'" (quoting *Cole*, 228 F.3d at 1104)).

Therefore, application of the principles enunciated in *Santa Fe* and *Lee* to the religious practice of proselytizing at a public high school sponsored and controlled graduation ceremony is *entirely consistent* with both the language and spirit of this Court's precedent. There is *absolutely nothing new* for the Court to decide in this case.

Santa Fe and *Lee*'s faithful application is further evidenced by the fact that they involve the *very same* issues of endorsement and coercion that are present in this case. The school district's plenary control over the Foothill graduation ceremony, especially student speech, makes it apparent that McComb's speech would have borne the imprint of the school district. *See Lee*, 505 U.S. at 590. First, the school district authorized the valedictory speech as part of the district-administered graduation ceremony; it was held at the Orlean s Arena,

which was rented and paid for by the school district; and only selected students were allowed to speak. *See Santa Fe*, 530 U.S. at 302-03. Second, the School Officials retained supervisory control over all aspects of the graduation and had final authority to approve the content of student speeches. *See id.* Finally, the speech was broadcast to the audience over a school-controlled microphone and amplification system. *See id.* at 307. Therefore, allowing McComb to give the original unedited version of her speech at the Foothill graduation would have constituted government endorsement of religious speech similar to the policies found unconstitutional in *Santa Fe* and *Lee*.

The element of coercion in this case also mirrors *Santa Fe* and *Lee*. The critical inquiry under *Santa Fe* and *Lee* to determine if religious activity at a major public school event constitutes impermissible coercion is whether "a reasonable dissenter . . . *could* believe that the group exercise signified her own participation or approval of it." *Lee*, 505 U.S. at 593 (emphasis added). Here, in examining the unedited version of McComb's speech, there is no question that a reasonable dissenter could have felt that her silence would signify her approval or participation in McComb's sermon regarding finding one's inspiration through Christ. (Pet. App. 6-7, 58-59).

As described by this Court in *Lee*, "high school graduation is one of life's most significant occasions." *Lee*, 505 U.S. at 595. The essence of a high school graduation is the participation of all, as a *captive audience*. *See Lee*, 505 U.S. at 630 (students and their families are a "captive audience" at high school

graduation ceremonies) (Souter, J., concurring); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986) (there is a need to protect public school students as a "captive audience" from certain types of speech); *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (the First Amendment permits the government to prohibit offensive speech as intrusive when the "captive audience" cannot avoid the objectionable speech); *see also Lassonde*, 320 F.3d at 985 ("the essence of high school graduation is the participation of all, as a captive audience"). Here, an unwilling participant at the Foothill graduation ceremony could have believed that, through silence, the group exercise signified her approval or acceptance of McComb's proselytizing sermon. Forcing a dissenter at the Foothill ceremony to make the choice between attending the event and participating in the religious practice of proselytizing would not have been constitutionally permissible. *Lee*, 505 U.S. at 595-96.

Although the discussion of applicable Supreme Court precedent should begin and end with *Santa Fe* and *Lee*, Petitioners pepper the Court with a myriad of purported conflicts and hypothetical questions that have no application to the facts of this case. The Court should not be mislead.

Petitioners argue that the School Officials violated the Establishment and Free Speech clauses by "favoring one type of religious speech over another." A closer examination of several of the cases cited by Petitioners reveals that the Ninth Circuit's Opinion is indeed faithful to this Court's precedent.

For example, the School Officials' conduct is not at odds with *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As an initial matter, this argument was not presented at the lower court levels. Petitioners did not cite *Lemon* in their briefs before the United States District Court of Nevada or in their Answering Brief submitted to the Ninth Circuit Court of Appeals. This Court should not decide in the first instance issues not decided below. *See, e.g., Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 n.3 (1999) (argument was neither raised nor considered below, and Court declines to consider it); *N.C.A.A. v. Smith*, 525 U.S. 459, 470 (1999) (Court will not decide in the first instance issues not decided below). Moreover, regulation of proselytizing speech would not result in excessive entanglement with religion in violation of *Lemon*. Quite the opposite is true. The School Officials' conduct was *necessary* to avoid an Establishment Clause violation.

The School Officials' conduct also does not pose an equal protection issue under *Larson v. Valente*, 456 U.S. 228 (1982). Once again, *Larson* was not raised by Petitioners in the lower court proceedings; and this Court should not decide this issue now. *See, e.g., Grupo Mexicano*, 527 U.S. at 319 n.3; *N.C.A.A.*, 525 U.S. at 470. Further, it is evident from the speeches of McComb and Oehler that there was no differential treatment of similarly situated persons. The Ninth Circuit's Opinion is not at odds with *Larson* in finding that the School Officials did not violate McComb's right to equal protection because "they did not allow other graduation speakers to proselytize." Ninth Circuit Opinion (Pet. App. 2); *see also* Audio: Oral Argument before the Ninth Circuit in McComb v. Crehan, 07-16194

(March 10, 2009), located at http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002983 (Chief Judge Alexander Kozinski recognized that the speeches of the two valedictorians, McComb and Gehler, were indeed "quite different.").

There is also no conflict with *Rosenberger v. Rector*, 515 U.S. 819 (1995). *Rosenberger* involved religious university students' access to university facilities and publications on a nondiscriminatory basis. Access cases, such as *Rosenberger*, bear no resemblance to graduates and parents gathered for a public high school graduation ceremony under the plenary control of the school district. The Supreme Court has consistently respected the rights of "captive audiences" to be free from intrusive speech. *Rosenberger* is also distinguishable because it involved viewpoint discrimination, which did not occur in this case.

There is also no conflict with *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). In *Good News Club*, this Court struck down a school district regulation that allowed after-hours access to school facilities for all groups except those espousing a religious message. The decision in *Good News Club* hinged on the fact that the school had no valid Establishment Clause interest in precluding the religious speech. *See id.* at 113. In stark contrast to this case, the after-hours meetings in *Good News Club* lacked the imprimatur of the school and involved only the voluntary participation of some students. *See id.* at 115-16.

The Ninth Circuit's Opinion in this case is faithful to this Court's precedent. The well-established authority of *Santa Fe* and *Lee* control in this case, and the Petition should be denied.

D. Any Purported Circuit Split Regarding Viewpoint Discrimination Under *Hazelwood* Is Not Fairly Presented In This Case

Petitioners claim there is "confusion among the Circuits" about the extent to which a school can engage in viewpoint discrimination when enforcing restrictions under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). Petitioners' futile attempts to create a purported split among the Circuits should be rejected by this Court.

First and foremost, the *Hazelwood* argument was not raised by Petitioners at the lower court levels. In fact, Petitioners did not even cite *Hazelwood* in their briefs before the United States District Court of Nevada or in their Answering Brief submitted to the Ninth Circuit Court of Appeals. Similarly, the School Officials did not rely upon *Hazelwood* in their briefs. Petitioners should not now be allowed to pose hypothetical splits in authority that have no application to the case at bar. *See, e.g., Grupo Mexicano*, 527 U.S. at 319 n.3; *N.C.A.A.*, 525 U.S. at 470.

Second, the absence of an actual "conflict" or "confusion" related to *Hazelwood* in this case is apparent from the Ninth Circuit's Opinion itself. The Ninth Circuit concluded that there was no First Amendment violation without *any* reference to *Hazelwood* or the level of

scrutiny. The Ninth Circuit found that the School Officials "did not allow other graduation speakers to proselytize." *See* Ninth Circuit Opinion (Pet. App. 2). Accordingly, the Ninth Circuit did not believe the School Officials had engaged in viewpoint discrimination and thus there was no need for the Ninth Circuit to apply *any test* for "enforcing" viewpoint discrimination under *Hazelwood*.

Third, there is no need for this Court to resolve any purported Circuit split because the School Officials' conduct would survive even the highest level of scrutiny under *Hazelwood* since there was no viewpoint discrimination in this case. Respondents did not "regulate speech in ways that favor some viewpoints or ideas at the expense of others." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). McComb's speech was not edited because it concerned the Christian faith as opposed to another sect of religion. Nor was it regulated because it presented a favorable as opposed to negative view of her faith.

Rather, the School Officials' actions represented a permissible *blanket exclusion of proselytizing speech*. *See Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 915 (9th Cir. 2007) (a "blanket exclusion of religious worship services" from the forum was upheld as a permissible content based restriction; religious worship is "not a viewpoint but a category of discussion"); *cf. Rosenberger*, 515 U.S. at 831 (recognizing the distinction between a permissible content based restriction of religion as a subject matter or category versus a prohibited restriction based upon religious viewpoint and perspective). As recognized by the Ninth

Circuit, McComb was the *only* speaker to include proselytizing language in her speech, and therefore hers was the only speech to be edited. *See* Ninth Circuit Opinion (Pet. App. 2).

Petitioners also argue that the Ninth Circuit drew an improper distinction between "nondenominational or civically oriented religious speech" and "sectarian religious speech." (Pet. at 5). No such distinction was made. This Court should reject the Petitioners' attempt to change the focus of the case and cloud the issues. The Ninth Circuit was concerned with *proselytizing* speech — plain and simple. *See* Ninth Circuit Opinion (Pet. App. 2) (referencing McComb's "proselytizing graduation speech" and finding that the school district "did not allow other graduation speakers to proselytize.").

In addition, contrary to Petitioners' contentions, there is no need for the Court to grant certiorari to provide further standards to define proselytizing speech. The Ninth Circuit determined that proselytizing comments are "'designed to reflect, and even convert others to, a particular religious viewpoint.'" *Cole*, 228 F.3d at 1103 (quoting *Doe v. Santa Fe Independent Sch. Dist.*, 168 F.3d 806, 817-18 (5th Cir. 1999)).[8] The edited

8. In *Santa Fe*, this Court reviewed the Fifth Circuit's decision which included the definition of proselytizing speech, and which is consistent with this Court's use of the term "proselytize" in other decisions. *See e.g.*, *Boy Scouts of America v. Dale*, 530 U.S. 640, 690-91 (2000) (in case involving revocation of assistant scoutmaster's Boy Scouts membership due to sexual orientation, this Court used the term proselytize in conjunction with references to advocacy, advancing particular views, and attempts to convert a person from one faith to another).

portions of McComb's speech constituted blatant proselytizing under this definition. It was not a case where fine-lines needed to be drawn. Moreover, even if it were such a case, *arguendo*, the Court in *Lee* expressly recognized that jurisprudence in this area "is of necessity one of line-drawing." *Lee*, 505 U.S. at 598.

Petitioners' argument regarding *Hazelwood* does not present a compelling reason for the Court to hear this case, and the Petition should be denied.

E. The Ninth Circuit Decision In This Matter Does Not Create a "Split" Among The Circuits Concerning The Time Limitation For Filing An Interlocutory Appeal

The Ninth Circuit's decision that there was jurisdiction under Rule 4 of the Federal Rules of Appellate Procedure is not at odds with decisions of other Circuit courts, and is faithful to this Court's decision in *Behrens v. Pelletier*, 516 U.S. 299 (1996).

1. Procedural Background

The School Officials filed a motion to dismiss Petitioners' initial Complaint based, in part, on the doctrine of qualified immunity. *See* Docket for the United States District Court for the District of Nevada ("Court Docket"). On December 18, 2006, the District Court held oral argument on the motion to dismiss and indicated that it would deny the motion in its entirety. *See id.*

On December 21, 2006, Petitioners filed an Amended Complaint which added an additional Defendant and significant factual allegations. *See* Am. Compl. (Pet. App. 17-56).

Subsequently, on January 9, 2007, the District Court entered a written order denying the School Officials' motion to dismiss Petitioners' original Complaint. *See* December 22, 2006 Court Order (Pet. App. 62-64); Court Docket. Contrary to Petitioners' contention, an appeal of the January 9 Order was *not* required. *The original pleading had been rendered void* by the filing of Petitioners' Amended Complaint.

On January 11, 2007, the School Officials filed a motion to dismiss Petitioners' Amended Complaint. *See* Court Docket. It was not merely a "carbon copy" of the first motion, but rather it addressed the new factual allegations and supplemented the School Officials' arguments in response to various observations the District Court had made during oral argument on the first motion. *See* Court Docket.

On June 18, 2007, the District Court entered a written order denying Respondents' motion to dismiss the amended complaint. *See* June 18, 2007 Court Order (Pet. App. 65-66). In the Order, the District Court did not conclude that the second motion to dismiss was improper. It merely suggested that the second motion was similar enough to the first that the District Court did not need to set forth detailed conclusions. *See id.*

On June 28, 2007, the School Officials filed a timely Notice Of Interlocutory Appeal from the District Court's June 2007 Order on the issue of qualified immunity. *See* Court Docket.

2. There Is No Genuine Conflict With Authority From Other Circuits Regarding Appellate Jurisdiction, And The Decision Is Faithful To This Court's Own Precedent In *Behrens*

In this case, the Ninth Circuit determined that it had jurisdiction to hear the appeal under *Knox v. Southwest Airlines*, 124 F.3d 1103 (9th Cir. 1997). Ninth Circuit Opinion (Pet. App. 2). In *Knox*, the district court denied the defendants' first motion for summary judgment based on qualified immunity, and the defendants did not appeal that ruling. The same defendants then filed a second motion for summary judgment based on qualified immunity to "supplement" their previous motion in light of the district court's earlier order. The court also denied that motion, and the defendants appealed. *Id.* at 1105.

On appeal, the plaintiffs in *Knox* argued precisely what Petitioners contend in this case — that the Ninth Circuit should have dismissed the defendants' appeal on the grounds "that it is untimely under Fed. R. App. P. 4(a)(1)" because it was filed more than 30 days after the district court's initial order denying defendants' first motion. *Id.* The Ninth Circuit in *Knox* held that the defendants' notice of appeal filed within 30 days of the court's denial of the defendants' *second* motion for summary judgment was timely. *See id.* at 1106.

In making its decision, the Ninth Circuit in *Knox* relied upon this Court's decision in *Behrens v. Pelletier*, 516 U.S. 299 (1996). In *Behrens*, the Supreme Court held that there was no jurisdictional bar to successive interlocutory appeals of orders denying successive pretrial motions on qualified immunity grounds. *See id.* at 310-11; *Knox*, 124 F.3d at 1106. The Ninth Circuit in *Knox* reasoned that *Behrens* permits appellate jurisdiction over an appeal from the denial of a second motion for summary judgment based on qualified immunity. *Knox*, 124 F.3d at 1106.

Similarly, it is also consistent with *Behrens* for the Ninth Circuit to allow the appeal in this case. Respondents appealed from the denial of the *first* motion to dismiss the Amended Complaint based on qualified immunity. Even if it could somehow be deemed a *second* motion to dismiss, it would still be permissible under *Behrens* as an appeal of the denial of a successive pretrial motion on qualified immunity grounds.

There is no Circuit split on this issue. First, the cases cited by Petitioners all *precede* this Court's decision in *Behrens v. Pelletier*, 516 U.S. 299 (1996), which resolves any purported confusion regarding interlocutory appeal of successive pretrial motions on qualified immunity grounds. Second, the Circuit decisions each are distinguishable based upon the *facts* of the case. *See Phillips v. Montgomery County*, 24 F.3d 736 (5th Cir. 1994) (decision plainly borne out of frustration with the litigants' improper tactics, in that defendants had filed *six motions to dismiss* on remarkably similar complaints); *Fisichelli v. City Known as Town of Methuen*, 884 F.2d 17 (1st Cir. 1989) (did not involve an

appeal from a denial of a motion to dismiss an amended pleading); *Taylor v. Carter*, 960 F.2d 763 (8th Cir. 1992) (no amendment of complaint); *Pruett v. Choctaw County, Ala.*, 9 F.3d 96 (11th Cir. 1993) (same; addressed timeliness of appeal from motion for reconsideration based on qualified immunity); *Armstrong v. Texas State Bd. of Barber Examiners*, 30 F.3d 643 (5th Cir. 1994) (no amendment of complaint).

Finally, Petitioners' argument does not make sense procedurally. The Amended Complaint was already pending at the time Respondents became able to appeal the denial of their motion to dismiss the original Complaint. The Amended Complaint was filed on December 21, 2006, and the Order denying the first motion to dismiss was not entered until January 9, 2007. Am. Compl. (Pet. App. 55); January 9, 2007 Order (Pet. App. 62-64); Court Docket.

Petitioners' Amended Complaint superseded the original Complaint. It is contrary to established law to appeal a denial of a motion to dismiss a complaint which is no longer extant in the case. It is well established that a complaint which has been amended pursuant to Federal Rules of Civil Procedure 15(a) supersedes the pleading it modifies, rendering the original pleading void. *See Pacific Bell Telephone Co. v. Linkline Commc'n Inc.*, 129 S. Ct. 1109, 1122 n.4 (2009); *Bullen v. De Bretteville*, 239 F.2d 824, 833 (9th Cir. 1956) ("It is hornbook law that an amended pleading supersedes the original, the latter being treated thereafter as non-existent."); 6 Wright & Miller, *Federal Practice & Procedure*, § 1476 (same).

Nothing in the well-established precedent of this Court or the Federal Rules of Appellate Procedure suggests that Respondents' course was improper or that the appeal was untimely.

CONCLUSION

Petitioners have asserted no ground in either case law or policy to grant review. The unpublished Ninth Circuit Opinion lacks sufficient precedential value to warrant review by this Court. The Opinion also does not create a split among the Circuits and is entirely faithful to the principles enunciated by this Court in *Santa Fe Independent District v. Doe* and *Lee v. Wiseman*. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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No. 08-1566

Supreme Court, U.S.
FILED
OCT 16 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BRITTANY McCOMB, and MARIANNA McCOMB, by her best friend, CONSTANCE J. McCOMB,
Petitioners,

v.

GRETCHEN CREHAN, ROY THOMPSON, and CHRISTOPHER SEFCHECK, individually and in their official capacities as employees of Foothill High School, and the Clark County School District, a political subdivision of the State of Nevada, and WALT RULFFES, in his official capacity as Superintendent of the Clark County School District, a political subdivision of the State of Nevada, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October 15, 2009

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INTRODUCTION

Respondents' primary argument is that the Establishment Clause required them to censor Brittany McComb ("Brittany" or "Petitioner") -- one of three public high school students selected because of their G.P.A. to write and give speeches at a graduation ceremony -- solely because she spoke about the key to her success in school (her faith in Christ) and told others that they could likewise succeed. *See* Plaintiffs' First Amended Complaint ("Compl.") at ¶¶ 16-21 (Petitioners' Appendix ("App.") at 24-25) This Court should grant certiorari to make clear that the Establishment Clause does not stretch so broadly to stifle personal student speech simply because it reflects a sectarian religious orientation. Yet the Ninth Circuit repeatedly has reached that conclusion[1] and it again did so here despite the presence of viewpoint discrimination between the student graduation speakers.

These overbroad Ninth Circuit rulings are taking a cumulative and unnecessary toll on Free Speech, well beyond this Court's expressed concerns with school prayer. *See, e.g., Nurre v. Whitehead*, No. 07-35867, 2009 WL 2857196 (9th Cir. Sept. 8, 2009) (Censoring school band instrumental performance of *Ave Maria* from school graduation

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[1] *Cole v. Oroville Union High School District*, 228 F.3d 1092, 1103 (9th Cir. 2000), and *Lassonde v. Pleasanton Unified School District*, 320 F.3d 979 (9th Cir. 2003).

ceremony because of its religious orientation). There are over 17,000 public schools in the Ninth Circuit[2] and this orientation undoubtedly stifles student speech across the West Coast. As such, we urge the Court to review this case and settle this question once and for all.

[2] *See* http://schooltree.org (tallying total number of public schools located within each State of the Union) (last visited Oct. 15, 2009).

I. The Decision Below Runs Contrary to *Weisman* and *Santa Fe*

Respondents first argue that this case is not certworthy because the speech at issue was not really Brittany's but that of the School District. In particular, Respondents claim that because school officials asked to review the students' speeches before they were given, the school had plenary control of the event. Petitioners' Opposition Brief ("Opp.") at 3-5. In Respondent's view, whatever student speech was given created the perception of being endorsed by the school district and became subject to Establishment Clause limitations under *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). *See id.*

Let us be clear -- the school district did not exercise "plenary control" over Brittany's speech by virtue of the principal's review of her speech. But even if the principal's review somehow gave the school district some control over what types of speeches should be prohibited -- for example, pornographic or incendiary speeches designed to disrupt the event -- that type of control does not mean that the school endorses whatever speech is permitted to go forward. Nor does that review suggest *primary* control over the "content" of wholly student-authored expression. The simple fact that the principal asks to review the speech does not entwine the school district with the substantive content of the speech. Otherwise, *any* speech that would be barred if given by the principal in his

official capacity would by definition be barred if given by the student. There is no logical stopping point to such an doctrine.

In fact, Respondent's "plenary control" argument flows from a misreading of the scope of *Weisman* and *Santa Fe*. Those cases involved school districts that, respectively, inserted themselves into the substantive content of school prayer, and actively encouraged student-initiated school prayer. *See generally, Weisman*, 505 U.S. 577, and *Santa Fe*, 530 U.S. 290. The school in *Weisman* selected a rabbi to deliver an "invocation" and "benediction" to the graduating class and provided materials for him to use in delivering the prayers (*Weisman*, 505 U.S. at 581); the school in *Santa Fe* engineered the election of a student speaker for a school event for the specific purpose of delivering a *prayer* to the student audience (*Santa Fe*, 530 U.S. at 296-97). Neither of these factual scenarios is remotely analogous to the situation here -- where no prayer was involved and where the student was one of three valedictorians invited to speak because of her class rank and informed that she could speak about what was important to her. *See* Compl. at ¶¶ 16-21 (App. at 24-25).

Nor does Respondents' invocation of Clark County School District Regulation ("Regulation") 6113.2 add anything material to their argument. Opp. At 4-5. That regulation was designed to encourage student speech (*see* Regulation 6113.2 (App. At 3)); it emphasizes a distinction between situations where neutrally selected students exercise

"primary control of the content of the expression" and when they do not. *Id.* Here, Brittany not only authored the content of her speech, she was solely and primarily responsible for its delivery. Compl. at ¶¶ 32-33 (App. at 30). There was no school policy against religious expression at graduation (*Id.*); indeed, where the expression was the student's and the student was selected by neutral criteria, school policy favored permitting the religious expression. Regulation 6113.2 (App. at 3).

Respondent's logic and the logic of the decision below would result in the censorship of any and all student-initiated speech that takes on a religious orientation so long as the speech reached the desk of a school official before it was given. The Ninth Circuit in fact appears to be headed towards that extreme. In its recent decision in *Nurre v. Whitehead*, No. 07-35867, 2009 WL 2857196 (9th Cir. Sept. 8, 2009), the Court upheld a school's prohibition on a student playing an instrumental version of *Ave Maria* at a high school graduation ceremony, due to the "religious nature" of the song. *Id.*, 2009 WL 2857196 at *5. The dissent in that case realized this went far beyond *Santa Fe* and *Weisman*, and raised concerns as to the ultimate effect of this ban:

> [I]f the majority's reasoning on this issue becomes widely adopted, the practical effect will be for public school administrators to chill - or even kill - musical and artistic presentations by their students in school-sponsored

> limited public fora where those presentations contain any trace of religious inspiration, for fear of criticism by a member of the public, however extreme that person's views may be.

Id., 2009 WL 2857196 at *9.

Petitioners respectfully request the Court to provide clarity as to whether the far reaching Establishment Clause Defense advanced by Respondents, that would justify the removal of all student-initiated religious speech with a sectarian component from graduation ceremonies, reflects a proper understanding of the balance between the Free Speech and Establishment Clauses.

II. The Permissibility of a Student-Initiated Speech Should Not Depend on a Distinction Between Proselytizing and Non-Proselytizing Speech

Respondents implicitly acknowledge that their "plenary control" argument proves too much by arguing that Brittany's speech violated the Establishment Clause for another reason -- , that it constituted "proselytizing." *See generally* Opp. at 25-27. To date, this Court has not permitted censorship of student religious speech based on whether it is non-proselytizing or proselytizing.

The sole definition of the term relied upon by Respondents derives from *Cole*, 228 F.3d at 1103,

and a Fifth Circuit case on which it relies (*Doe v. Santa Fe Ind. Sch. Dist.*, 168 F.3d 806, 817-18 (5th Cir. 1999)). In these authorities, proselytizing is any comment "designed to reflect, and even convert others to a particular religious viewpoint."[3] *Id.* This Court should grant certiorari and hold that the Constitution does not permit school districts to prohibit speech that otherwise would be viewed as that of the non-governmental speaker solely because it falls within a highly subjective and overbroad distinction between "proselytizing" and "non-proselytizing" speech.

For one thing, courts are ill-equipped to distinguish between proselytizing and non-proselytizing religious speech. It is moreover unclear why "proselytizing" *speech* is inherently coercive but non-proselytizing speech is not. Consider the following two examples. A student gives a twenty minute speech that is suffused with references to God and God's role in the student's life and successes. The speech is personal and contains no exhortation to others to convert. A second student gives a nearly identical speech but then adds "I am where I am because of my Buddhist faith and if you follow the Buddhist Eightfold Path I believe you will succeed and find happiness as I have." It

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[3] The *Cole* Court also relied on *Follett v. McCormick*, 321 U.S. 573, 576-77 (1944), and *Murdock v. Pennsylvania*, 319 U.S. 105, 108-10 (1943) to equate prayer with what it termed to be the "religious practice" of door-to-door evangelizing. *Cole*, 228 F.3d at 1104.

cannot credibly be contended that the second speech presents Establishment Clause concerns while the first does not, and yet that is the substance of the Ninth Circuit's judgment in this case. *See* Oral Argument before the Ninth Circuit in *McComb v. Crehan*, 07-16194 (Mar. 10, 2009), http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002983 (last visited Oct. 15, 2009).

Inevitably, this distinction between proselytizing and non-proselytizing speech is devolving into more invidious viewpoint discrimination based on the extent to which the speech is deemed to be sectarian. That in fact is what Petitioners believe occurred here. Two students gave speeches with religious orientations. *See* Compl. at ¶¶ 64-66 (App. at 36-41). Janelle Oehler ("Janelle") spoke about God and her beliefs in a non-sectarian, but arguably proselytizing, manner. *Id.* Brittany's speech contained references to her particular faith in Christ which Respondents deemed to be proselytizing. *Id.* Janelle's speech was deemed acceptable but Brittany's was not. *Id.*

While Respondents clumsily argue that the greater number of "I"s and "me"s in Janelle's speech warranted the disparate treatment (*see* Opp. at 9-10), the record in fact reflects that every time Brittany wrote "Christ" or "Jesus" in her draft speech school district officials struck them out and then censored the speech by turning off the microphone in the presence of parents, classmates and friends (*see* Compl. ¶¶ 56-64 (App. at 35-36); "Filling That Void" (App. at 58). By contrast,

Janelle was permitted to advocate that prayer and a relationship to God is the path to personal success:

> [O]ur meal is never started without prayer. My Heavenly Father plays an extremely important role in my life. I am confident that I would not be standing before you today if I had not included Him in my life. He is the One who truly understands our individual needs. . . . I would be nothing without Him [God]. Find your inspiration. Living with the hope for a brighter future will make a significant difference in our lives, provide us with true inner happiness and personal success. If we strive to be more motivated by inspiration, we will find ourselves more satisfied, as if we had enjoyed a complete balanced and nutritional spaghetti dinner.

Excerpt of Janelle's Speech (App. at 8).

While Brittany may have spoken about her faith at greater length, the principal distinction in the speeches was that Brittany's was avowedly sectarian and Janelle's was not.

Far from preventing an Establishment Clause violation, by selectively intervening to censor Brittany's commencement speech, the Respondents committed one by preferring a "civic-religious"

speech over a sectarian one. *See Weisman*, 505 U.S. at 588.

Finally, it is not at all clear what standards the Ninth Circuit is using to determine what is and what is not proselytizing. Respondents' actions in this case are tainted with the standardless personal predilections found unconstitutional in *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992), and its progeny. There is no First Amendment doctrine that permits, let alone encourages, such a linear and potentially discriminatory approach to student-initiated religious speech. To the contrary, the Court has cautioned that religous clause cases are intensely fact-specific and that the entire context must be examined. Indeed, in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), Justice O'Connor stated in her concurring opinion that these types of cases "depend[] on the hard task of judging-sifting through the details and determining whether the challenged program offends the Establishment Clause." *Id.* at 847; *see also Weisman*, 505 U.S. at 597 (noting that "[o]ur Establishment Clause jurisprudence remains a delicate and fact-sensitive one"). Instead of deliberate fact-finding, the Ninth Circuit has opted for a form of summary justice based on an "I know it when I see it" standard that is, in fact, standardless. We respectfully request that this Court use this petition to reaffirm the principle that context matters in the evaluation of student-initiated high school graduation speeches.

III. This Court Should Reconcile A Clear Difference in Jurisprudence Between the Circuits

Over the past several years, circuit and district courts have been interpreting the scope of *Weisman* and *Santa Fe* with differing and contrasting results that requires clarification from this Court. The Ninth's Circuit's decision below, its recent decision in *Nurre* and its earlier decisions in *Cole*, 228 F.3d at 1103, and *Lassonde*, 320 F.3d at 979-80, took a stunningly broad view of the Establishment Clause's reach -- virtually any involvement by the school officials in the student's speech gave the speech the appearance of being endorsed by the school district. The Eleventh and Eighth Circuits have reached different results interpreting the same two Supreme Court cases. The Eleventh Circuit in *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001), and the Eighth Circuit in *Doe v. School District of Norfolk*, 340 F.3d 605 (8th Cir. 2003), both rejected the argument that *Santa Fe* and *Weisman* require a "total ban" on religious references at school functions. *See Adler* 250 F.3d at 1332-33; *Norfolk*, 340 F.3d at 611-12. In those cases, the ceremonies at issue were school-sponsored events on school premises under school control. *Id.* The speeches were broadcast by the schools using school equipment. *Id.* Before determining whether censorship was necessary, the *Adler* and *Norfolk* Courts examined the entire context in which the speech was made and ultimately concluded that no Establishment Clause issues existed. *Id.*

There is therefore a clear need for this Court to intervene and clarify the proper analytical approach to such questions and the scope of the Establishment Clause's reach.

IV. Petitioners Have Fairly Presented All Issues Which Remain Ripe for Review

Respondents urge that the issues presented in this case have previously been addressed in the Petitions for Certiorari in the *Cole* and *Lassonde* cases, and thus do not need to be revisited by this Court. To the contrary, this case presents an invidious example of viewpoint discrimination that was not pressed in *Cole* and *Lassonde*, and occurred in the instant matter precisely *because* this Court did not grant certiorari in those cases. As such, the Court should do so now.[4]

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[4] Respondents also assert that *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 n.3 (1999), and *N.C.A.A. v. Smith*, 525 U.S. 459, 470 (1999) prohibit Petitioners from raising claims related to Entanglement, Viewpoint Discrimination and Equal Protection. Opp. at 22. *Grupo Mexicano* and *N.C.A.A.*, both involved attempts by the parties to argue novel theories not raised in the Court below. *See Grupo Mexicano*, 527 U.S. at n.3; *N.C.A.A.*, 525 U.S. at 470. Here, Petitioners' Entanglement and Viewpoint Discrimination claims are both inextricably intertwined with the First Amendment claims pled in the Amended Complaint briefed and raised fully below. Comp. ¶¶ 67-90 (App. at 41-48). Similarly, all claims attendant to Equal Protection were also pled in the Amended Complaint and raised in Petitioners' Equal Protection Clause arguments below as well. Compl. ¶¶ 91-97 (App. at 48-50). Despite Respondents' assertions to the

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CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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contrary, Petitioners' use of Supreme Court case law to support these claims (as opposed to the Ninth Circuit case law used below) does not render the claims "novel" or an "issue of first instance." They have been presented as issues in the case from its inception.